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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO., INC.
AND MEYER BLINDER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a district court required to make specific findings regarding the likelihood of future unlawful conduct when it imposes an injunction against future securities law violations that can be, and is being, used by the Division of Enforcement of the Securities and Exchange Commission to attempt to revoke the broker-dealer registration of a national securities firm and to bar its principal officer from the securities business?

2. Does an underwriter's good faith purchase of less than ten percent of the units in an "all-or-none" offering violate the securities laws?

3. Does good faith reliance on the advice of legal counsel preclude a finding of requisite scienter for securities fraud violations?

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SECURITIES AND EXCHANGE COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Blinder, Robinson & Co., Inc. and Meyer Blinder pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case.

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit affirmed the injunction issued barring petitioners from violating various provisions of the securities laws and regulations of the Securities and Exchange Commission ("SEC"), including Section 17(a) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b), Rules 10b-5, 10b-6, and 10b-9 promulgated thereunder, 17 C.F.R. §§ 240.10b-5, -6, -9, Section 15(c) of the 1934 Act, 15 U.S.C.

§ 78o(c), and Rule 15c2-4 promulgated thereunder, 17 C.F.R. § 240.15c2-4. The court of appeals' decision, which is unreported, is set forth in the Appendix ("App.") at 1a-6a. The district court's Injunction, Memorandum and Order are set forth at App. 9a-36a.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1983. Rehearing was denied on July 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of the 1933 Act, 15 U.S.C. §§ 77a et seq., the 1934 Act, 15 U.S.C. §§ 78a et seq., and the Rules of the SEC, are set forth at App. 37a-42a.

STATEMENT OF THE CASE

In May of 1979, American Leisure Corp. ("American Leisure") filed a registration statement with the SEC for 10 million units of securities, each unit consisting of a share of common stock and two classes of warrants and priced at $2.50. Petitioner Blinder, Robinson & Co., Inc. ("Blinder, Robinson"),[1] the President and principal shareholder of which is petitioner Meyer Blinder, was the underwriter of the offering on an "all-or-none" best efforts basis. The offering was made to provide initial funds for planning, licensing fees, land acquisitions, and initial construction costs of a casino hotel in Atlantic City. Prospectus at 20-21.[2] After seven months of re-

[1] Blinder, Robinson is a registered broker-dealer with 24 offices nationwide and approximately 75,000 active accounts. It specializes in underwriting new issues for relatively small businesses. Since 1977, the firm has undertaken 64 underwritings, 62 of which have been successful.

[2] The prospectus has been lodged separately with the Clerk of the Court.

view by the SEC, the registration statement became effective on December 26, 1979.

The "all-or-none" condition for the underwriting required the sale of all of the ten million units before the closing, which was scheduled for ninety days from the effective date of the offering, or March 25, 1980, although the terms of the offering allowed for a ninety day extension of this deadline. App. 11a. In the weeks before the initial deadline, Blinder, Robinson inquired of legal counsel whether or not an underwriter in an offering of this type could purchase some of the securities in the offering. After counsel's consultation with both the SEC staff and the National Association of Securities Dealers ("NASD"), Mr. Blinder was told by counsel that no SEC or NASD rule prohibited such a purchase, as long as the underwriter did not sell its shares at a premium in the aftermarket. App. 14a. Mr. Blinder was also advised that it would be prudent to purchase less than ten percent of the offering. App. 52a, 67a.[3]

The offering in fact closed as scheduled on March 25, 1980, with all ten million units having been sold for total proceeds of $25 million. Among these sales were three transactions which the SEC later called into question. The first was a sale of 600,000 units to a corporation which obtained a loan of $1.5 million to purchase those units from its local bank, which in turn sold two short-term certificates of deposit to the issuer, American Leisure. App. 16a. The second transaction was a sale of 400,000 units to an individual investor, who was assisted

[3] Mr. Blinder also received advice from some of his lawyers that if such a purchase occurred, Blinder, Robinson should disclose the purchase to the securities holders because there were outstanding warrants that could be exercised in the future. App. 15a, 43a-46a, 48a, 55a-56a. Mr. Blinder determined not to do so in advance of the closing because the revised prospectus would not be deliverable before the closing, and no one had suggested that this purchase would be cause for delaying the closing pending disclosure. App. 57a.

in his purchase by a $700,000 loan from the Metro National Bank of Denver, which was serving as escrow agent for the American Leisure offering. App. 16a. The third supposedly questionable transaction was the only one in which Blinder, Robinson and Mr. Blinder had any decision-making authority. On March 20, 1980, after having been informed by legal counsel that it could purchase some of the securities being offered, Blinder, Robinson applied for a $2.5 million line of credit with the Metro National Bank (App. 64a-65a), which was approved after the bank received a favorable reference from Blinder, Robinson's New York bank. App. 47a. On March 24, 1980, Blinder, Robinson purchased 956,393 units of the offering (less than ten percent, upon advice of counsel), assisted by drawing down $2,371,988 on the line of credit. App. 16a, 62a. Upon the closing of the offering,[4] Blinder, Robinson was credited $2,475,000, representing the firm's commissions for the completion of the offering. App. 16a. The loan was repaid out of this credit. Consistent with the advice received from legal counsel, at no time after this purchase were there any sales of these securities by Blinder, Robinson at a premium above the price paid in the offering, although sales were made at a loss to the firm.

Five months after the completion of the offering, the SEC commenced an action in the United States District Court for the District of Colorado alleging violations by petitioners of Section 17(a) of the 1933 Act, Sections 10(b) and 15(c) of the 1934 Act and SEC Rules 10b-5, 10b-6, 10b-9 and 15c2-4. On June 8, 1982, the district court entered findings of fact and conclusions of law

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[4] The closing was attended by the attorneys who had advised Blinder, Robinson that it could, within limitations, purchase the American Leisure securities. App. 43a-44a, 54a-57a. None of them raised any question about the validity of the closing. App. 57a, 59a, 61a. Blinder, Robinson thereafter treated the offering as having been completed.

and an order enjoining petitioners from future violations of the stated provisions of law and regulations.

The district court found that the distribution of the underwritten securities had not been completed because the three transactions described above were sham transactions that did not represent *bona fide* purchases of the American Leisure securities. The court rejected the defense of good faith reliance on advice of legal counsel, focusing on the fact that Blinder, Robinson and Mr. Blinder did not accept the advice of counsel to submit a revised prospectus, and suggesting that counsel were not fully informed by petitioners as to the nature of the transaction that was planned. App. 31a-33a. The court also found that Blinder, Robinson salesmen had misstated, and omitted to state, material facts, by discussing the possibility of a land acquisition by American Leisure and by suggesting in response to customer inquiries that the securities could sell for a premium in the aftermarket. App. 19a. The district court issued the injunction sought by the SEC without making any finding relating to the likelihood of future violations of the securities laws by Blinder, Robinson or Mr. Blinder.

The court of appeals affirmed the district court judgment on September 19, 1983, again focusing on petitioners' failure to revise the offering prospectus, but ignoring the issue of petitioners' reliance on advice of counsel in deciding to purchase the securities and in assuming that such a purchase was to be treated as a *bona fide* purchase for the purpose of completing the offering. App. 4a. The appeals court also found that injunctive relief was warranted despite the lower court's failure to make any express findings on the issue of the threat of continuing unlawful activity by petitioners. App. 6a. On July 23, 1984, the court of appeals denied petitioners' motion for rehearing. App. 7a-8a. An additional petition for rehearing and an appeal of a denial of a motion under Rule 60(b), Fed. R. Civ. P. 60(b), are pending before the Tenth Circuit.

On June 27, 1984, the SEC issued an Order for Public Proceedings to determine whether the SEC should administratively sanction petitioners, based upon the allegations of its Division of Enforcement that an injunction had been issued and that certain securities law violations had occurred. App. 69a-77a.[5] In this administrative proceeding, petitioner Blinder, Robinson faces possible revocation of its broker-dealer registration, and petitioner Meyer Blinder faces a possible bar from continuing activities in the securities business.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT ERRED BY GRANTING AN INJUNCTION WITHOUT ANY FINDINGS REGARDING THE LIKELIHOOD OF FUTURE UNLAWFUL CONDUCT BY PETITIONERS.

The district court below erred by issuing an injunction without any findings regarding the likelihood that petitioners would commit *future* securities law violations. Even though the district court found *past* violations, and that most of those violations were committed with scienter, the law articulated by this Court and others requires that there be additional proof and findings that there is a reasonable likelihood of *future* violations before the forward-looking remedy of enjoining defendants from such violations is granted. The court of appeals compounded this error by brushing aside the district court's failure to make any specific findings of likelihood of recurrence with the observation that "[n]o particular recitations are required." App. 6a.

In *Aaron v. SEC*, 446 U.S. 680 (1980), this Court observed that in SEC injunctive actions, the SEC must

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[5] The securities laws make the mere issuance of the civil injunction by the district court a ground for administrative sanctions. *See* Section 15(b)(4)(C) of the 1934 Act, 15 U.S.C. § 78o(b)(4)(C) (1982).

establish a sufficient evidentiary predicate "to show that a future violation may occur." [6] Chief Justice Burger, concurring in *Aaron*, cited the requirement that there be a showing that "there is a reasonable likelihood that the wrong will be repeated." [7] This Court had previously indicated that injunctive relief in private actions under the securities laws required a finding "that there exists some cognizable danger of recurrent violation." [8] Except for the case where the SEC steps in to prevent an ongoing violation—which is not the present case—the language of the major applicable provisions, Section 20 (b) of the 1933 Act and Section 21(d) of the 1934 Act,[9] requires "a finding of 'likelihood' or 'propensity' to engage in future violations," not merely proof of past violations.[10]

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[6] 446 U.S. at 701. *See SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 98-100 (2d Cir. 1978).

[7] 446 U.S. at 703, citing *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972). *Accord SEC v. Keller Corp.*, 323 F.2d 397, 402 (7th Cir. 1963); 3 L. Loss, *Securities Regulation*, 1976 (1961).

[8] *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 59 (1975), quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

[9] Section 20(b) of the 1933 Act, 15 U.S.C. 77t(b) (1982), and Section 21(d) of the 1934 Act, 15 U.S.C. § 78u(d) (1982), speak of enjoining "any person [who] is engaged or about to engage in any acts or practices which constitute or will constitute a violation." Section 20(b) and Section 21(d) both provide that "upon a proper showing a permanent or temporary injunction or restraining order shall be granted . . . ."

[10] *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d at 99-100; *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978). *See SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8, 18 (2d Cir. 1977) ("the Commission cannot obtain relief without positive proof of a reasonable likelihood that past wrongdoing will recur"); *SEC v. Parklane Hosiery*, 558 F.2d 1083 (2d Cir. 1977); *Chris-Craft Industries, Co. v. Piper Aircraft Corp.*, 480 F.2d 341, 394 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

Not only must the SEC make the requisite showing to support an injunction, the district court must make a specific finding of likelihood of recurrence. In *SEC v. Commonwealth Chemical Securities, Inc.*,[11] for example, the Second Circuit reversed an injunction as to some defendants because the district court had not made the necessary finding. To support the injunction, the district court had done no more than make the observation that "[w]e see no reason to believe that, should a similar opportunity [to engage in misconduct] arise in the future, [defendants] would shy away." [12] The Second Circuit reversed, stating that this was "hardly a finding of likelihood of recurrence." [13]

One principal reason that specific findings are necessary is the severe impact that injunctions have on the enjoined party. The injunctive remedy has been characterized in this Court as "a drastic remedy, not a mild prophylactic," [14] and for good cause. The collateral consequences of an injunction "can be very grave." [15] In this very case, the SEC's Division of Enforcement is currently seeking to use the injunction granted by the district court as a basis for a suspension or revocation of petitioner Blinder, Robinson's broker-dealer registration and a bar of petitioner Meyer Blinder from any future association with a broker-dealer. *See* § 15(b)(4)(C) of the 1934 Act. 15 U.S.C. § 78o(b)(4)(C) (1982). Similar penalties can arise for investment advisers under § 203(e) of the In-

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[11] 574 F.2d 90 (2d Cir. 1978).

[12] *Id.* at 101.

[13] *Id.*

[14] *Aaron v. SEC*, 466 U.S. at 703 (Burger, C.J. concurring).

[15] *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d at 99. *See SEC v. Geon Industries, Inc.*, 531 F.2d 39, 54-55 (2d Cir. 1976); Note, *The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) after Ernst & Ernst v. Hochfelder*, 77 Colum. L. Rev. 419, 442-43 & n.127 (1977); Mathews, *SEC Civil Injunctive Actions*, 30 Bus. Lawyer 1303, 1307-10 (1975).

vestment Advisers Act, 15 U.S.C. § 80(b)-3(e) (1982). The Investment Company Act prohibits anyone subject to an injunction from serving as an employee, officer, director, member of an advisory board, investment advisor or depositor of a registered investment company. 15 U.S.C. 80(a)-9(a)(2) (1982). The grant of an injunction can also constitute grounds for barring any attorney, accountant or other expert from practicing before the SEC, under SEC Rule 2(e)(3)(i), 17 C.F.R. § 201.2(e)(3)(i) (1984). An issuer of securities subject to injunction may be deprived of a Regulation A exemption under Rule 252(c)(4) of Regulation A. *See* 17 C.F.R. § 230.252(c)(4) (1984). In addition, the consequences of an injunction may include loss of business and injury to reputation.[16] All of these severe consequences make it essential that the decision to grant an injunction be susceptible of meaningful challenge on appeal. Only by providing findings in support of the injunction can the issue of its propriety be intelligently considered by an appellate court.

The Federal Rules of Civil Procedure acknowledge the importance of specific findings by the trial court, both generally and particularly with regard to injunctions. Rule 52(a) provides that a court sitting without a jury "shall find the facts specially and state separately [the] conclusions of law thereon." Fed. R. Civ. P. 52(a). The purpose of Rule 52 (a) is to aid the appellate court in its review as well as the trial court in its adjudication.[17]

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[16] *See SEC v. Harwyn Industries Corp.*, 326 F. Supp. 943, 957 (issuance of injunction can sometimes have a harmful impact on personal reputations and legitimate business activites of defendants); *SEC v. Broadwall Securities, Inc.*, 240 F. Supp. 962, 967 (S.D.N.Y. 1965) (adverse effect of injunction upon defendants is a factor to be considered).

[17] *United States v. Birnbach*, 400 F.2d 378, 382 (8th Cir. 1968). *See ICC v. Cardinale Trucking Corp.*, 308 F.2d 435 (3d Cir. 1962). Where the court does not make findings which are sufficient to indi-

And Rule 65 reiterates this requirement specifically as to injunctions by stating that each order granting an injunction must "set forth the reasons for its issuance." Fed. R. Civ. P. 65(d).

As this Court and others have held, the injunctive remedy is a severe one that should be used sparingly and only when a future-directed remedy is needed. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations"); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (the injunctive process "was designed to deter, not to punish"). The district court and court of appeals below ignored that admonition by granting, and then affirming, an injunction based solely on findings of past violations. It is apparent that this Court must reiterate its position on the prerequisite findings for issuance of an injunction if the courts below are to be made to adhere to the rules articulated by this Court.

II. THE COURTS BELOW WRONGLY CONCLUDED THAT PETITIONERS' PURCHASE OF LESS THAN TEN PERCENT OF THE UNITS IN AN "ALL-OR-NONE" OFFERING VIOLATED THE SECURITIES LAWS.

After being advised by counsel that there was no prohibition against an underwriter purchasing securities in an all-or-none offering, Blinder, Robinson purchased 956,393 units (less than ten percent of the total offering) to complete the offering. The district court concluded that a transaction of this type was not a *bona fide* transaction, and therefore that the offering was not, in fact, completed by this purchase. App. 25a-28a. Most of the violations found by the district court flowed from this conclusion. The court of appeals affirmed. App. 3a. Because, as peti-

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cate the factual basis for its ultimate conclusion, the appropriate procedure is to vacate the judgment and remand for such findings. *United States v. Rohm & Haas Co.*, 500 F.2d 167 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

tioners' counsel was told by attorneys at the SEC and NASD, there is no prohibition against a purchase of less than ten percent by an underwriter to complete an "all-or-none" best efforts offering, this Court should grant this petition and put the confusion to rest.

The SEC alleged that petitioners violated Rules 10b-6 and 10b-9 when the firm purchased for its trading account 956,393 shares of the offering prior to completion of the offering. As the district court below observed, Rule 10b-6 was "designed to prohibit market manipulation by any person participating in the distribution of a security for the duration of that participation." App. 24a. The courts below considered Rule 10b-6 applicable to events after March 25, 1980, the day petitioners believed the offering had been completed, because Blinder, Robinson's purchase of 956,393 units operated to prevent a completion of its distribution. App. 4a, 25a-27a. Rule 10b-9 requires refunds to be made on an all-or-none offering if all securities are not sold at the specified time and if the total amount due the issuer is not received by the issuer by the specified date. App. 27a. The courts below considered Rule 10b-9 to have been violated because Blinder, Robinson's purchase did not bring the offering to completion and no refunds were made to the other investors. App. 4a, 27a-28a.

There is no authority in support of the legal conclusions that Rules 10b-6 and 10b-9 were violated. The SEC has never said that an underwriter is forbidden to purchase securities in an all-or-none offering; the staff attorneys at the SEC and NASD who told counsel that there was no bar to the purchase (App. 14a) were correct. The courts below predicated their findings on the notion that a purchase of this nature was not *bona fide* but did not explain the basis for this pivotal conclusion.[18] In fact, this assumption is without basis. Blinder, Robinson paid the full

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[18] The only cases that discuss an underwriter's purchase of shares in an all-or-none offering present altogether different circumstances. In *SEC v. Coven*, 581 F.2d 1020, 1028 (2d Cir. 1978), *cert. denied*,

purchase price for the units and accepted the risk that the shares would drop in value. Shareholders were not injured. The full amount of proceeds from the offering was deposited in an escrow account as required. The issuer received the entirety of the $25 million (less underwriting commissions and related expenses) which the offering was intended to raise. Therefore, in connection with Rule 10b-6 the distribution was complete, and the events that trigger a refund under Rule 10b-9 did not occur.

Furthermore, the district court below did not make a finding of scienter with respect to the violations of Rule 10b-9, which rested in part on the purchase by petitioners of less than ten percent of the units; and the court of appeals affirmed without addressing the issue of scienter as it relates to Rules 10b-6 and 10b-9. While this Court has never addressed the applicability of scienter to Rules 10b-6 and 10b-9, there can be no question after *Ernst & Ernst v. Hochfelder* [19] and *Aaron v. SEC* [20] that a finding

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440 U.S. 950 (1979), many of the shares had not been sold at all and the underwriters made a false certification to the bank of the number of shares sold. In *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1094-95 (2d Cir. 1972), a large purchaser was guaranteed against loss, some purchasers received reduced prices, some shares were given in exchange for services or to satisfy debts, and an escrow account was never established. *A.J. White & Co. v. SEC*, 556 F.2d 619 (1st Cir.), *cert. denied*, 434 U.S. 969 (1977), in which *one-half* the minimum amount in an all-or-none offering was raised through short-term bank loans, also represents an egregious violation of Rule 10b-9, in contrast to the present case. Finally, SEC Release No. 11532, on which the district court below relied, is aimed at situations where "phony" transactions in "nominee accounts" had been used to create the appearance that an offering had been "sold out." The release speaks of "purchases by the issuer through nominee accounts or purchases by persons whom the issuer has agreed to guarantee against loss." SEC Act Release No. 11532 (July 11, 1975). No such purchases were ever alleged in the present case.

[19] 425 U.S. 185 (1976).

[20] 446 U.S. 680 (1980).

of scienter is needed.[21] The SEC may not promulgate rules under Section 10(b) that do not include the elements which Congress intended to require for a violation of of that Section—including intent to defraud, or scienter.[22] At the trial below, the SEC did not adduce fraud with respect to the alleged violations of Rule 10b-9, and indeed, there was no evidence that anyone was defrauded by petitioners' purchase.

Resolution by this Court of the question whether an underwriter may purchase less than ten percent of the units in an all-or-none offering, especially when no scienter or scheme to defraud has been found as to the Rule 10b-9 violation, is necessary to provide certainty to underwriters that they do not violate the securities laws by doing the one thing that best shows their confidence in the offering: risking their own capital by taking a small percentage of the offering themselves.

III. PETITIONERS' RELIANCE ON ADVICE OF LEGAL COUNSEL PRECLUDED THE NECESSARY FINDING OF SCIENTER FOR THE SECURITIES VIOLATIONS ALLEGED.

This petition presents the unresolved issue of whether good faith reliance on the advice of counsel rebuts allegations that a defendant acted with scienter. Petitioners maintained that their reliance on counsel did prove the absence of scienter. The district court held that its "finding [that petitioners acted with] scienter precludes a find-

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[21] *See Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1164 n.39 (5th Cir. 1982) (an "SEC rule cannot be used to make an end-run around the language and intent of a statute"), *vacated on other grounds*, 460 U.S. 1007 (1983); *SEC v. Burns*, [Current Transfer Binder] Fed. Sec. L. Rep. ¶ 91,669 (S.D. Cal. Aug. 31, 1984) (scienter required under Rule 10b-6).

[22] *Hochfelder*, 425 U.S. at 193, and *Aaron*, 446 U.S. at 701, hold that scienter is an essential element of a violation of Section 10(b), under which Rules 10b-6 and 10b-9 were promulgated.

ing of good faith by the firm with respect to" petitioners' alleged violations of the securities laws (App. 32a), and that petitioners had not satisfied the elements of the defense of good faith reliance on advice of counsel in any event. App. 32a-33a. The court of appeals did not address petitioners' argument that the district court had erred.

Courts have recognized that seeking advice of counsel, particularly in areas as complex as the securities laws, should be encouraged. In *SEC v. Spectrum, Ltd.*, 489 F.2d 535 (2d Cir. 1973), the Second Circuit observed:

> "The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters." *Id.* at 541-42.

Accordingly, courts recognize the defense, where good faith or lack of due care is an element of an offense, of reliance on advice of counsel. The "advice of counsel" defense requires a defendant (1) to have acted in good faith and with care in selecting counsel he believes competent, (2) to have disclosed to counsel all facts he believes relevant, and (3) to have received and acted in accordance with erroneous advice on a matter of law.[23] Each of the elements has been met here.

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[23] *SEC v. Savoy Industries*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1101-2; *Papilsky v. Berndt*, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,627 at 90, 132-35 (S.D.N.Y. June 21, 1976); *SEC v. M.A. Lundy Associates*, 362 F. Supp. 226, 233 (D.R.I. 1973); *United States v. Hill*, 298 F. Supp. 1221, 1234-35 (D. Conn. 1969). *See generally Williamson v. United States*, 207 U.S. 425, 453 (1908); Hawes and Sherrard, *Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 Va. L. Rev. 1, 19 (1976); M. Feuer, *Personal Liabilities of Corporate Officers and Directors* 96-

(1) The SEC has never contended that the attorneys on whose advice petitioners relied were unqualified. Each was known to petitioners to be an experienced specialist in corporate and securities matters.

(2) The district court found fault with Meyer Blinder for not disclosing to counsel all relevant facts. App. 32a-33a. But laymen cannot be expected to be aware of which facts may be critical to their attorney's advice.[24] Experienced counsel has the responsibility of knowing which facts are relevant to the advice the client has sought and to inquire as to any relevant facts which the client may not have mentioned. The record clearly demonstrates that counsel was well acquainted with the situation and that petitioners made no attempt to prevent counsel from obtaining any information counsel believed to be relevant.

(3) Petitioners received advice that the contemplated purchase by Blinder, Robinson was permissible to complete the offering and acted on that advice. All counsel were aware of the purpose of the purchase. While some counsel thought stickering the prospectus was advisable as a precaution, that suggestion did not relate to the question of the validity of the purchase itself and the completion of the offering. *All* counsel were present on Friday, March 21, when most of the papers needed for the closing were signed, and *no one* objected or asserted that a sticker was necessary to close the offering.[25]

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101 (2d ed. 1974); F. Bailey & H. Rothblatt, *Defending Business and White Collar Crimes* 128 (1969); Preston, *Advice of Counsel as a Defense*, 28 Va. L. Rev. 26 (1941); Comment, *Reliance on Advice of Counsel*, 70 Yale L.J. 978 (1961).

[24] *Davis v. Commissioner*, 184 F.2d 86, 88 (10th Cir. 1950); *Pool v. Pool*, 22 So. 2d 131, 133 (La. App. 1945).

[25] The district court attached importance to the absence of a formal opinion letter, but while counsel did not render a formal written opinion, counsel clearly provided legal advice. Formal written opinions are not and should not be required for a client to rely in good faith on advice of counsel. *See* remarks of then-SEC Com-

Scienter, which the district court below found in connection with violations of Sections 17(a)(1) and 10(b) and Rules 10b-5 and 10b-6, requires a "mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976). Good faith reliance on counsel, however, obviates the element of intent. Proof of good faith will refute the element of scienter or bad faith, and proof of reliance on the advice of counsel provides evidence of a defendant's good faith.[26]

If, as the district court below suggests, a finding of scienter precludes the defense of good faith reliance on counsel, the "mental state" necessary for scienter would take on an entirely different meaning. For if a client followed advice given in good faith and believed the conduct was in accord with law, how could the client simultaneously have an "intent to deceive, manipulate, or defraud"? When the defense is raised, therefore, the trial court should first determine whether the elements are present. If so, a findinfi of scienter is unjustified.

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missioner Bevis Longstreth, *Reliance on Advice of Counsel as a Defense to Securities Law Violations*, Legal Times of Washington, Dec. 14, 1981, at 18, 21 ("As a matter of policy, no such rules [regarding whether opinion must be written] need be ,or should be prescribed. The test of reasonableness will suffice . . . [c]ircumstances may not always allow time for the written word to be set and delivered."). *Compare SEC v. M.A. Lundy Associates*, 362 F. Supp. at 233 (rejecting the defense because counsel clearly qualified his opinion as "informal," further qualified it with the word "probably," there was little legal basis for the opinion, and the attorney made no effort to seek advice of the SEC).

[26] *See Pittsburgh Terminal Corp. v. Baltimore & O.R.R. Co.*, 680 F.2d 933, 942-43 (3d Cir.), *cert. denied*, 459 U.S. 1056 (1982) ("advice of counsel may bear upon scienter . . . where counsel mistakenly but in good faith represent that some information is either immaterial or clear"); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1101 ("good faith reliance on advice of counsel may be a factor to consider in deciding whether to grant injunctive relief); *Spirt v. Bechtel*, 232 F.2d 241 (2d Cir. 1956); *SEC v. Lum's, Inc.*, 365

This Court should review this issue to make it clear that advice of counsel should be sought and that, if reasonably given and observed, it precludes the state of mind essential to a finding of scienter.

CONCLUSION

For the reasons set forth above, certiorari should be granted to review the judgment of the court of appeals.

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October 22, 1984

F. Supp. 1046 (S.D.N.Y. 1973); *SEC v. Harwyn Industries*, 326 F. Supp. 943, 954-57 (S.D.N.Y. 1971). *See generally* W. Prosser & W. Keeton, *The Law of Torts* § 107, at 741 (5th ed. 1984).

APPENDIX

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APPENDIX

Not for Routine Publication

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

82-1954

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,
v.
BLINDER, ROBINSON & CO. and MEYER BLINDER,
Defendants-Appellants.

Appeal From The
United States District Court
For The District Of Colorado
(D.C. Civil No. 80-M-1125)

[Filed September 19, 1983]

Mahlon M. Frankhauser of Barrett, Smith, Schapiro, Simon & Armstrong, Washington, D.C. (Mark W. Atwood of Barrett, Smith, Schapiro, Simon & Armstrong, Washington, D.C., with him on the brief, Marc N. Geman, Englewood, Colorado, of counsel), for Defendants-Appellants.

Rosalind C. Cohen, Assistant General Counsel, Securities and Exchange Commission (Jacob H. Stillman, Associate General Counsel, Rodney K. Vincent, Special Counsel, Sarah A. Miller, and Allyn C. Shepard, Attorneys, with her on the brief, Paul Gonson, solicitor, of counsel), Washington, D.C., for Plaintiff-Appellee.

Before SETH, Chief Judge, BREITENSTEIN and HOLLOWAY, Circuit Judges.

SETH, Chief Judge.

This is a civil enforcement proceeding by the Securities and Exchange Commission against Meyer Blinder and Blinder, Robinson & Co., Inc. Mr. Blinder was the principal shareholder of the Company and was the active individual participant in the several transactions. The trial court issued the injunction and the defendants appeal.

The memorandum of the trial court contains a full description of the events leading up to the offering here in issue. It describes the participants and the sequence of events, and it is not necessary to repeat here the descriptions. The memorandum also sets out the findings of fact which we conclude are well supported by the record. These findings demonstrated the several violations of the Securities Acts as asserted by the SEC. We will briefly describe the several events which took place at about the time set for closing the offering, and list the consequences thereof.

Blinder, Robinson & Co. was best efforts underwriter for an offering on an all or none basis of shares and warrants of a new corporation, American Leisure. The corporation was to build and operate a casino at Atlantic City. The "all or none" offering was to be of 10 million units (shares and warrants) at $2.50 each, and to be open for a period of 90 days. The proceeds of the sales were to be deposited in the Metro National Bank of Denver in escrow pending closing. The escrow agreement provided for a limited distribution of funds for underwriting costs, commissions and expenses if the total of

$25 million was received within the all or nothing time which was to end March 25.

Thus the closing of the offering was to be March 25. On March 19 the parties realized that the entire offering would not be sold by the 25th, and efforts were made to sell large blocks. One such sale was to Scope, Inc. of 600,000 units with funds to be procured through a loan from a Florida bank. The loan was arranged on the basis that a $1.5 million certificate of deposit be purchased with below market rate interest and another $1.5 million certificate at the market rate. The funds to purchase the certificates were to be provided by the Metro National Bank in Denver out of the escrow account. The Metro National Bank also loaned Blinder-Robinson $2.3 million on March 24 so the underwriter could purchase 956,393 units which had not yet been sold to the public. These went into Blinder-Robinson's trading account. On March 25 the Metro National Bank transmitted the three million dollars to the Florida bank for the certificates of deposit. These two purchases were not bona fide to enable the offering to be closed, and a third sale on March 21 of 400,000 units to Mr. Van Baal with a loan from Metro National Bank should also be placed in this category as the trial court found.

It is apparent from the record that the offering was not closed on March 25 nor any other time within the contemplation of the regulations. As a consequence the disbursement of the escrow funds was improper as was the trading beginning on March 25 by Blinder-Robinson in the units out of its account.

The record supports the findings of the trial court that there was a violation of section 17(a) of the 1933 Act and section 10(b) of the 1934 Act. The evidence shows the use of manipulative and deceptive devices and the making of untrue statements of material facts and the omission of material facts from statements causing them

to be misleading. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128.

The trial court found the manipulations and nondisclosures engaged in during the last several days of the offering to be in violation of the duty to disclose, and referred especially to the Scope purchase which was not made known to other purchasers, the $700,000 loan by the Metro National Bank to enable the purchase of 400,000 units, and, of course, the failure to disclose Blinder-Robinson's purchase of 956,393 units from trading at the last minute with what amounted to an advance of funds from the escrow account.

The most obvious failure to disclose was this purchase by Blinder-Robinson of the 956,393 units which were going to remain unsold on the day set for closing. Mr. Blinder was advised by the attorneys to make known this purchase to those who had purchased units but a "business decision" was made not to disclose so the reputation of the underwriter would not be damaged. This purchase was a material fact especially since this was a new corporation with no operational history. *See* A. J. White & Co. v. SEC, 556 F.2d 619 (1st Cir.); Kerbs v. Fall River Industries, Inc., 502 F.2d 731 (10th Cir.); and SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir.).

Since the last several large transactions were not bona fide the closing of the offering did not come about on March 25. The dealing by Blinder-Robinson during the period following March 25 was a violation. It was a continuation, after the stated closing date had passed, of the distribution. Rule 10b-6(c)(3) defines the permitted period of distribution. R. A. Holman & Co. v. SEC, 366 F.2d 446 (2d Cir.).

With the failure of the closing in this all or none offering there was a clear obligation to make refunds. This was not done and Rule 10b-9 was violated, as the trial court found.

As the trial court also found there was a violation of Rule 15c2-4 in that the escrow account was not properly handled in that funds were transferred out of the account before the closing. These transfers are referred to above.

The trial court concluded that the showing of scienter was sufficient to meet the requirements of sections 17(a)(1), 10(b) and Rule 10b-5 under the decisions of Aaron v. SEC, 446 U.S. 680; Ernst & Ernst v. Hochfelder, 425 U.S. 185; Hackbart v. Holmes, 675 F.2d 1114 (10th Cir.); and SEC v. Haswell, 654 F.2d 698 (10th Cir.). These findings cover such facts as the instructions by Mr. Blinder to his sales force, through to the failures to advise of the developments during the last part of the offering period. The trial court found a "knowing 'intent to deceive, manipulate or defraud' under *Ernst & Ernst*," and we agree. This continued through March 25, as mentioned herein, and beginning on March 25 Blinder-Robinson made a market for the securities and so traded out of its trading account.

The aider and abettor argument of the defendants is not persuasive. We considered the issue in SEC v. Barraco, 438 F.2d 97 (10th Cir.), and the Ninth Circuit reached a similar conclusion in Harrison v. Smith, 693 F.2d 932 (9th Cir.), holding that aider and abettor liability exists.

The findings of the trial court on the several elements or aspects of the case referred to herein are sufficient to support the injunctive relief—thus the nature of the violations, the knowledge that certain actions were in violation, placement of the shares purchased in the trading account, the deliberate deception by the sales force and the finding by the trial court on scienter. Thus as the trial court found, "[t]he defendants knew that the closing of March 25, 1980 was a pretense," and further the court said:

> "This is not a case of 'recklessness'; the defendants acted with a knowing 'intent to deceive, manipulate, or defraud' under *Ernst & Ernst.*"

The record warrants the issuance of the injunction and the several findings are adequate. No particular recitations are required. *See* SEC v. Haswell, 654 F.2d 698 (10th Cir.).

It is the order and judgment of the court that the judgment of the trial court is affirmed.

JULY TERM—July 23, 1984

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

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No. 82-1954

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

vs.

BLINDER ROBINSON & CO., INC., and MEYER BLINDER,
Defendants-Appellants,

AMERICAN LEISURE CORP., NATAHAN S. JACOBSON, IRWIN S. LAMPERT, CAVANAUGH COMMUNITIES CORPORATION, JOSEPH KLEIN, SCOPE, INC., and LEON JOSEPH,
Defendants.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

By /s/ Robert L. Hoecker
ROBERT L HOECKER
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-M-1125

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

BLINDER, ROBINSON & CO., INC.; MEYER BLINDER; *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

[Filed June 8, 1982]

MATSCH, Judge

This is a civil enforcement action against Blinder, Robinson & Co., Inc. (Blinder-Robinson), a registered broker-dealer, and Meyer Blinder (Blinder), its president and principal shareholder. The plaintiff's allegations of violations of federal securities laws and regulations all concern offers to sell, sales and delivery after sales of a registered offering of 10 million units of common stock and warrants issued by American Leisure Corp. (American Leisure), a New Jersey corporation, which was a wholly-owned subsidiary of Beef & Bison Breeders, Inc. (BBB).

The SEC brought this action pursuant to Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b) (1976), and Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d) (1976). This court has jurisdiction of the action under Section 22(a) of the 1933 Act, 15 U.S.C. § 77v(a) (1976), and Section 27 of the

1934 Act, 15 U.S.C. § 78aa (1976). Venue in this court is proper: Blinder-Robinson is located and does business within the State of Colorado, Blinder resides in the state, and many of the acts alleged in the SEC's complaint occurred within the state.

The complaint alleged violations of the anti-fraud provisions of both Securities Acts, Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1976), Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) (1976), and of Rules 10b-5, 6 and 9 promulgated thereunder, 17 C.F.R. §§ 240.10b-5, 6, 9 (1981); it also alleged violations of Section 15(c) of the 1934 Act, 15 U.S.C. § 78o(c) (1976), which prohibits fradulent acts by brokers, and of Rule 15c2-4 promulgated thereunder, 17 C.F.R. § 240.15c2-4 (1981). The Commission seeks an injunction against future violations of these sections and rules.

In addition to Blinder-Robinson and Blinder, the SEC originally named the following corporations and individuals as defendants in this action: American Leisure, Cavanagh Communities Corp., Scope, Inc., Nathan S. Jacobson, Irwin S. Lampert, Joseph Klein, and Leon Joseph. These defendants all have entered into consent decrees with the SEC, and no longer are active parties in this litigation.

FACTS

The offering was on a "best efforts, all or none basis." For a unit price of $2.50, the purchaser received one share of American Leisure common stock; one Class A Warrant (two of which entitled the holder to purchase one share of common stock for $3.50 on or before July 26, 1980); and one Class B Warrant (four of which entitled the holder to purchase one share of common stock for $7.00 on or before December 26, 1980). The offering was to be open for a period of 90 days from December 26, 1979, the effective date of the registration statement. A subscription offer of 2 million of the 10 million units

was made to the shareholders of BBB. The proceeds from the offering and the exercise of the warrants were intended to be used for the construction and operation of a casino hotel in Atlantic City, New Jersey.

Blinder-Robinson was the underwriter for this offering and the underwriting agreement with American Leisure provided for the deposit of all monies collected from subscribers into a special account at Metro National Bank of Denver, Colorado (Metro Bank). It also required the refund of that money and termination of the offer if all of the units were not sold within 90 days from the effective date of the prospectus, or an additional 90 days if extended by mutual agreement between the issuer and the underwriter. The parties did not agree to extend the original deadline of March 25, 1980.

The prospectus made it clear that this offering was for an extremely speculative investment. Not only was American Leisure a new business without an operating history, it was unable to make any immediate use of the proceeds because it had only 1.72 acres of land in Atlantic City and that was insufficient for the development. The prospectus cautioned that American Leisure would have to acquire more land or obtain the necessary variances and approvals to permit the use of its parcel. Accordingly, the prospectus provided that after the closing of the offering, the net proceeds, less deduction of underwriting costs, discounts, commissions and expenses, would be placed in a second escrow account with Metro Bank, as escrow agent, to hold the proceeds for a period not exceeding one year, during which no more than $1 million could be released for certain limited purposes.

Irwin Lampert, an attorney, has had a close personal relationship with Meyer Blinder since they met in Florida in 1972. Mr. Lampert was counsel for Blinder and Blinder-Robinson in an earlier securities case. Mr. Lampert has been president of BBB since its inception in

1976, and Blinder-Robinson did a small underwriting of one-half million dollars when that company went public. When BBB acquired American Leisure, Irwin Lampert became secretary-treasurer of that company and asked Meyer Blinder to do the underwriting of the securities to obtain the money for the casino hotel development. Meyer Blinder suggested a larger issue than was originally contemplated and recommended the use of warrants to obtain additional funds as the work progressed. He also recommended the employment of Nathan Jacobson as president because of his experience with gambling casinos in Nevada. That was accomplished and Mr. Jacobson, Mr. Lampert and Mr. Blinder met frequently in early 1979 to discuss this project.

The law firm of Friedman and Shaftan, P.C., of New York, New York, was retained as counsel for American Leisure in the offering and the Denver law firm of Brenman, Epstein and Zerobnick, P.C., represented the underwriter. That firm had frequently been counsel for Blinder-Robinson in other underwritings. Because of some difficulties in communicating with the SEC, American Leisure also retained Bernard Feuerstein, a New York lawyer, to assist with the registration. That was pursuant to the recommendation of Meyer Blinder.

The Blinder-Robinson sales force was very enthusiastic about the American Leisure offering. Most of them were quite young (under 30), inexperienced, aggressive and uninhibited. They talked up the American Leisure opportunity with their regular customers before the prospectus became effective and sales were brisk in January and February, 1980. It was common practice for the sales representatives to say that the American Leisure securities would open at a premium in the after-market and some suggested that $5.00 or more could be expected as the opening price. The evidence supports a finding that an established sales practice was to suggest that Blinder-Robinson people had inside information about pending

developments which would make the stock increase in price, and this finding is buttressed by the convenient lapse of memory of sales representatives called as witnesses in this trial.

Much of what the sales representatives said was generated at a sales managers' meeting held in Florida in January, 1980. At that time, Meyer Blinder told the managers that negotiations were proceeding for American Leisure to obtain additional land in Atlantic City and that there would be a public announcement when the deal was made. The managers relayed the same message to the sales representatives who incorporated it in their presentations.

At the time of that meeting, Blinder knew of talks between Irwin Lampert and Joseph Klein, chairman of the board of Cavanagh Communities Corp. (Cavanagh), a company which had a contract to purchase 8.4 acres of land in Atlantic City, near the American Leisure site. Meyer Blinder had participated in those conversations in 1979. After Cavanagh acquired the land, Jacobson talked further with Klein who said there would be an interest in some arrangement if the American Leisure offering succeeded.

In January, 1980, Mr. Jacobson reported to Mr. Klein that the offering was going quite well, and Mr. Klein replied that he couldn't negotiate then because of a pending deal with another company which would or would not be made by February 15. That deal was not made and Lampert then called Klein and said that $19 million of the offering had been sold, but another market-maker was needed for the final $6 million. Joseph Klein recommended Elkins and Co. (Elkins) which agreed to sell $5 million worth of American Leisure units, but then reduced its participation to $2½ million on legal advice that it should not take more than 10% of the issue.

Mr. Sgarlet of Elkins also was involved with Cavanagh and that involvement generated legal concerns for Elkins if an agreement were to be made between Cavanagh and American Leisure. Accordingly, on March 5, 1980, Mr. Nagy of Elkins called Mr. Padgett, vice-president of Blinder-Robinson, to read a draft of a letter advising purchasers and prospective purchasers of the American Leisure securities that there was no agreement between Cavanagh and American Leisure. Mr. Padgett refused to approve that letter because there was still hope for such an agreement. The result was the withdrawal of Elkins and the cancellation of many of its sales. Other cancellations also were coming through in early March.

It had been expected that the American Leisure offering would be completed and sold out during the week beginning Monday, March 17, 1980. Accordingly, the principal persons involved came to Denver to prepare for a closing during that week.

Recognizing a possibility that the issue would not be sold out, Meyer Blinder had asked Bernard Feuerstein to find out if an underwriter could purchase the securities in a "best efforts, all or nothing" offering, and Mr. Feuerstein called John Della Grotta, a young lawyer at the Washington, D.C. office of the SEC, about March 10, to ask the narrow question of whether there was an absolute restriction or a special rule prohibiting that possibility. Mr. Della Grotta replied that there was none. Mr. Feuerstein advised Mr. Blinder of that answer. Mr. Feuerstein also talked with the National Association of Security Dealers (NASD) on the same subject and received that same answer with the caveat that there would be concern if the underwriter sold the shares at a premium in the aftermarket.

What had been a possibility soon became a probability during the week of March 17 and there were further discussions by the involved lawyers concerning the purchase

of a large block of the securities by Blinder-Robinson. Of particular concern was whether that purchase would be a material development which should be disclosed by a supplement to the prospectus, commonly called a "sticker." One sticker had already been placed on the prospectus because of a development concerning the subscription offer to the BBB shareholders.

While the evidence is conflicting, the more probable and credible testimony is that Bernard Feuerstein, Gerald Raskin of the Brenman firm, and Mr. Brenman as well, all concluded and advised both Blinder and Padgett that such a sticker would be necessary. When questioned concerning the basis of their advice, both Raskin and Brenman said that it was because the warrants imposed a continuing obligation on the issuer to disclose material developments, even after the closing date. That advice, which had been communicated by March 20, 1980, was rejected as a "business decision" by Meyer Blinder and others at Blinder-Robinson. Part of the rationalization for that rejection was that a sticker was seen as futile since more copies of the prospectus would not be delivered, and because it would damage Blinder-Robinson's reputation in the industry if it became known that it could not sell out an offering.

By Wednesday, March 19, 1980, it became apparent that the offering would not be sold out by the deadline of March 25, 1980. Irwin Lampert flew to Miami, Florida, to meet with Joseph Klein and he, in turn, introduced Leon Joseph, a former Cavanagh employee who was the principal of a company called Scope, Inc. (Scope). That company had substantial cash and was negotiating with Klein about the possibility of buying the equity in Perdido Bay Country Club Estates, a real estate development which was in foreclosure. Scope had a good banking relationship with Great American Bank of Dade County, Florida (Great American), and had purchased certificates of deposit from that bank.

On Friday, March 21, 1980, Joseph Klein, his father Zola Klein, and Irwin Lampert met with Leon Joseph about the possible purchase by Scope of 600,000 American Leisure units. They went to the Great American Bank to negotiate a $1.5 million loan for that purpose. During the discussions, Mr. Klein suggested that Scope could realize a quick profit which could then be used to buy the Perdido Bay property and that he would try to guarantee the loan through Cavanagh. The final agreement was that the loan would be made at an interest rate of 2% more than the bank would pay on a certificate of deposit to be purchased by American Leisure, and Irwin Lampert, on behalf of American Leisure, then agreed that it would buy two certificates of deposit from the Great American Bank; one for $1.5 million at 10% and the other for $1.5 million at 16%, the latter being the market rate at the time. The bank loan to Scope was then made at 12%. It is a fair inference that the loan would not have been made without the agreement for the purchase of the certificates of deposit.

Also on March 21, 1980, a sales representative of Blinder-Robinson assisted his customer, Johan Van Baal, in obtaining a loan of $700,000.00 from Metro Bank for the purpose of assisting in the purchase of 400,000 units of American Leisure. That purchase was effected on March 24, 1980.

The Metro Bank issued Blinder-Robinson a cashier's check, dated March 24, 1980, for $2,371,987.50 for the purchase of the 956,393 units which had not been sold to the public. Those 956,393 units were put in the Blinder-Robinson inventory trading account. The loan was not secured and it was not recorded in the bank's loan records, contrary to the routine business practice of the bank.

On March 25, 1980, the Metro Bank credited Blinder-Robinson for $2,475,000.00, an amount representing the firm's commissions for the sale of 10 million units. Also

on March 25, 1980, the bank wired $3,000,000.00 from the escrow account to the Miami bank for American Leisure to purchase certificates of deposit. Both of these distributions occurred prior to a formal closing of the offering. In fact, no closing ever took place. Most of the closing documents had been executed at the Metro Bank on March 20, 1980, when the offering was far short of completion. By letter of that date, an assistant vice-president of the Metro Bank wrote to the Division of Securities of the State of Colorado and included the following two paragraphs:

> Kindly consider this letter our certification to you that there is on deposit in the above mentioned Escrow Account the aggregate sum of $25,000,000.00 the same being held for the purposes as set forth in the Escrow Agreement.
>
> In view of the foregoing, the Metro National Bank, as Escrow Agent hereby request [sic] authorization from the Colorado Securities Commissioner to release to American Leisure Corp., and/or Blinder, Robinson and Company such funds now on deposit in the Escrow Account, or as may hereafter be deposited into said Escrow Account. (Plaintiff's Exhibit 39P).

At the trial of this matter that bank officer testified that the letter was actually delivered to the Colorado Securities Department on March 24, 1980, during working hours. That certification was false even as of March 24, because the $1,500,000.00 from the Miami bank did not arrive until March 25.

Blinder-Robinson began trading from the inventory of 956,393 American Leisure units with members of the public and other broker-dealers on March 25, 1980. From that date until July 18, 1980, Blinder-Robinson sold 2,209,320 units and purchased 1,828,715 units.

On August 28, 1980, the SEC and Blinder-Robinson orally stipulated that as of that date the firm would cease trading for its own account in American Leisure securities, and would freeze the firm's holdings in those securities. The stipulation permitted Blinder-Robinson to continue executing unsolicited agency transactions involving American Leisure securities. In a written stipulation filed on April 27, 1981, the Commission and Blinder-Robinson agreed to vacate the earlier stipulation and substituted one which permitted Blinder-Robinson to resume its trading in American Leisure, but continued to require a freeze of the firm's holdings as of August 28, 1980. These stipulations define the continuing after-market distribution as from March 25, 1980 until August 28, 1980, although the evidence before the court traces Blinder-Robinson's after-market trading activity only through July 18, 1980.

SECURITIES ACTS VIOLATIONS

Section 17(a), 10(b), and Rule 10b-5. The SEC alleges that Blinder-Robinson violated Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b-5, by embarking on a fraudulent course of conduct throughout the firm's involvement in the American Leisure offering. The Commission points to alleged fraudulent conduct during Blinder-Robinson's effort to sell the offering, and in connection with the closing of the "all or none" offering. Defendants' position is threefold: 1) that the alleged misrepresentations were not material; 2) that defendants cannot be held responsible for the acts of their salespeople; and 3) that the SEC has failed to establish scienter. Upon consideration of all of the evidence, my conclusion is that Blinder and Blinder-Robinson violated Sections 17(a), 10(b), and Rule 10b-5.

At the outset it is noted that throughout the relevant time period defendants used the mails, telephone and other means of interstate commerce in their various

transactions with regard to the American Leisure offering.

Sections 17(a) and 10(b) prohibit the use of manipulative or deceptive device, or scheme or artifice to defraud, in connection with the offer, sale or purchase of any security. Section 17(a)(2) and Rule 10b-5 specifically prohibit the making of any untrue statement of material fact or the omission to state a material fact necessary in order to make the statements made not misleading. A "material fact" is one which a reasonable investor might have considered important in the making of an investment decision. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972). Actual reliance need not be shown, *id.*, but defendants' scienter must be established for purposes of Rule 10b-5, Section 10(b), and Section 17(a)(1). *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 691, 697 (1980); *Securities and Exchange Commission v. Haswell*, 654 F.2d 698 (10th Cir. 1981).

Meyer Blinder and the Blinder-Robinson sales force aggressively promoted the American Leisure securities before the registration statement became effective and then followed the manipulative and deceptive practice of maintaining market interest by suggesting that the hotel-casino development would be assured because of deals that were being made. The sales presentations followed a pattern of misstatements and omissions. Sales representatives predicted that the American Leisure securities would open at a premium in the after-market, without any factual basis for their predictions. They told buyers that the firm's personnel had inside information about developments positively affecting the issuer, when in fact there were no positive developments for the new company during the distribution period.

The cancellations in March came largely as a result of the letter, dated March 10, 1980, from Gabriel Nagy as

general counsel of Elkins to its customers, containing the following paragraphs, among others:

> We have been informed that some interest in this offering has been generated in part by the expectation that ALC might invest some or all of the net offering proceeds in a casino project to be developed jointly with Cavanagh Communities Corporation ("CCC"). These two companies own neighboring parcels of land in Atlantic City, New Jersey, and there has been speculation in the public press that they might develop their properties jointly.
>
> Partners and registered representatives of this Firm have substantial investments in CCC, and one of them currently serves as President of CCC.
>
> We have also been informed that ALC and CCC had preliminary, tentative discussions sometime [sic] ago concerning the possibility of a joint development of their properties. However, we are told, no agreements or preliminary understandings resulted from those discussions, those discussions have been terminated and no negotiations or discussions are currently in progress between the two companies.
>
> It is presently contemplated that the ALC offering will not settle before March 19, 1980. As noted above, we are not recommending the purchase of units. As the prospectus notes at page 9, you should understand that you may lose all or part of your investment in the units. If you decide that you do not wish to purchase the units, you may cancel this transaction *without obligation*, by so advising your registered representative by 4:00 P.M. on Thursday, March 13, 1980. (Plaintiff's Exhibit 40K).

Mr. Lampert, for American Leisure, and Mr. Padgett, for Blinder-Robinson, objected to this letter and urged that it not be sent because Mr. Lampert said that negotiations would continue. In my view, Elkins acted appropriately and Blinder-Robinson should have done the same thing. Given the sales practices which had been followed, the Blinder-Robinson customers buying the American Leisure units should have been given this information and the failure to provide it constitutes a fraudulent practice.

These statements and omissions are directly attributable to Blinder and, through him, to Blinder-Robinson.[1] It is clear that the Blinder-Robinson sales force practiced a program of deliberately deceptive misinformation which Blinder orchestrated. Even if the evidence did not demonstrate his active role, this court would hold Blinder liable for the acts of sales representatives whom he supervised and for whose misconduct he is responsible under Section 20 of the 1934 Act, 15 U.S.C. § 78t (1976). *A.J. White & Co. v. Securities and Exchange Commission*, 556 F.2d 619, 622 (1st Cir. 1977), *cert. denied*, 434 U.S. 969 (1977); *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 410 F.Supp. 1002 (S.D.N.Y. 1976), *aff'd. in part and modified in part*, 574 F.2d 90 (2nd Cir. 1978).

Blinder and Blinder-Robinson did not disclose the frantic manipulations which resulted in the pretension that all of the issue had been sold by the March 25 deadline. The investors were not told that $3,000,000.00 of the proceeds of the public offering had been committed to be used as an accommodation for the loan necessary for the Scope purchase with half of that amount invested at 6 points below the market rate. They were not told that the Metro Bank was so anxious to assist its good customer, Blinder-Robinson, that it found it expedient to make a $700,000.00 loan to a person who had no prior

[1] "A firm . . . can act only through its agents, and is accountable for the actions of its responsible officers." *A.J. White & Co. v. Securities and Exchange Commission*, 556 F.2d 619, 624 (1st Cir. 1977), *cert. denied*, 434 U.S. 969 (1977). *Accord, Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731, 741 (10th Cir. 1974).

warrants), common stock and warrants of American Leisure Corp., through the use of any means or instruments of transportation or communication in interstate commerce, or of the mails:

(1) employing any device, scheme, or artifice to defraud; or

(2) obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(3) engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or upon any person; or

(4) using or employing, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors; or

(5) bidding for or purchasing for any account in which they have a beneficial interest, any security which is the subject of a particular distribution of securities in which they have agreed to participate, or any security of the same class and series, or any right to purchase any such security, or attempting to induce any person to purchase any such security or right, until after they have completed their participation in such distribution; or

(6) making any representation to the effect that any security is being offered or sold on an "all or none" basis unless the security is part of an offering or distribution being made on the condition that all or a specified amount of the consideration paid for such security will be

promptly refunded to the purchaser unless (a) all of the securities being offered are sold at a specified price within a specified time, and (b) the total amount due to the seller is received by him by a specified date; or

(7) making any representation to the effect that any security is being offered or sold on any other basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering or distribution being made on the condition that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless (a) a specified number of units of the security are sold at a specified price within a specified time, and (b) the total amount due to the seller is received by him by a specified date; or

(8) accepting any part of the sale price of any security being distributed unless the money or other consideration received is promptly transmitted to the persons entitled thereto; or

(9) accepting any part of the sale price of any security being distributed unless, if the distribution is being made on an "all or none" basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (a) the money or other consideration received is promptly deposited in a separate bank account, as agent or trustee for the persons who have the beneficial interests therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto, or (b) all such funds are promptly transmitted to a bank which has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein and to transmit or return such funds directly to the persons entitled

banking connection there, and to loan Blinder-Robinson almost the full amount of its commission with the bank paying itself off from that commission in immediate distribution of the first escrow. They were not told that Blinder-Robinson would, itself, purchase 956,393 units, and place them in inventory to participate in aftermarket transactions.[2]

The misstatements and omissions in this case are material. Information regarding the condition of the issuing company is of great significance to the reasonable investor, particularly where the company is new. *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Moreover, in an "all or none" offering of securities by a new company, whether all the securities have been sold to the public in bona fide transactions is of particular importance because the "all or none" contingency is the investors' principal protection. Each investor is comforted by the knowledge that unless his judgment to take the risk is shared by enough others to sell out the issue, his money will be returned.

In *A.J. White & Co.*, where one-half of the minimum amount in an "all or none" offering was raised through non-bona fide short term loans, the First Circuit Court of Appeals affirmed the Commission's decision that the purported closing without disclosure of the purchases was a material omission under section 17(a) and 10(b), and Rule 10b-5:

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[2] The court finds without merit defendants' reasons for not attaching a sticker to the prospectus, despite counsel's advice. Their claim that a sticker would be useless since all the prospectuses were distributed already is not a valid excuse: "If it was too late to disclose the change, the investors had a right to assume that the prospectus would be complied with, not changed." *A.J. White & Co.*, 556 F.2d at 623. Their fear of damage to Blinder-Robinson's business reputation does not excuse their nondisclosure, but simply demonstrates the materiality of the omissions, as discussed *infra* at 14-15.

> Particularly in cases such as this, an offering of shares in a new company, one of the investors' major concerns will be whether the price they are paying for the securities is a fair market price. The inability of the underwriter to sell the specified minimum to bona fide investors may well indicate that the market judges the offering price to be too high. Thus, to declare an offering completed through non-bona fide sales financed through bank loans, where the purported investors have not made an investment decision backed with their own money, may significantly mislead the legitimate investors as to a crucial factor in their decision.

Id., 556 F.2d at 623.

Perhaps most telling in all of the evidence presented at the trial of this case is the testimony of Mr. Padgett that he and Meyer Blinder decided to make a business decision contrary to the advice of their attorneys because to do otherwise would be very damaging to the company's reputation by letting it be known that it could not sell out this offering. That is an admission of materiality.

The requisite scienter for a violation of Sections 17(a)(1), 10(b), and Rule 10b-5, has been defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n.12 (1976). The courts of appeal are in agreement that reckless behavior satisfies the scienter requirement. *Hackbart v. Holmes*, No. 80-1368 (10th Cir. April 19, 1982) (cases cited in slip op. at 6). In *Hackbart*, the Tenth Circuit adopted the following definition of recklessness: " 'an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.' " *Hackbart*, slip op. at 7 (quoting *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977).

Defendants' contention that their mental state fell short of the requisite scienter is rejected.[3] The evidence fails to establish a basis in fact for the representations made by Blinder to his sales force regarding American Leisure's prospects for success. Rather, it shows that Blinder knew that the company had no positive developments during the distribution period, and that the offering was meeting with difficulty. The defendants knew that the closing of March 25, 1980 was a pretense. There is no more telling indication of knowledge than the direct receipt of the advice of the involved attorneys to attach a sticker to the prospectus. But despite that knowledge of the materiality of their conduct, and its potential consequences, they ignored counsel's advice. This is not a case of "recklessness"; the defendants acted with a knowing "intent to deceive, manipulate, or defraud" under *Ernst & Ernst.*

Rule 10b-6. The SEC alleges that Blinder and Blinder-Robinson violated Rule 10b-6 when the firm purchased for its trading account 956,393 American Leisure units, continued selling those units to the public, and simultaneously bid for and purchased American Leisure units. Defendants' position is that the firm's purchase of the remaining American Leisure units prior to the specified closing date of the "all or none" offering operated to complete the offering and to remove subsequent activities from the ambit of the rule.

Rule 10b-6 was promulgated by the SEC under Section 10(b) of the 1934 Act, and is designed to prohibit market manipulation by any person participating in the distribution of a security for the duration of that participation. In this case the SEC has established that defend-

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[3] Of course, Blinder-Robinson is a corporate entity which is not capable of possessing a "mental state." But for purposes of establishing scienter, Blinder's mental state is imputed to Blinder-Robinson. *Securities and Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1096-97, nn. 16-18 (2nd Cir. 1972).

ants participated in a distribution of American Leisure units, which continued beyond the specified closing date of the offering, and that during their participation defendants bid for and purchased American Leisure units, in manipulation of the market and in violation of Rule 10b-6.[4]

Rule 10b-6 does not define "distribution" as used therein, but in its administrative decisions the SEC has clarified the meaning of the term. In *Gob Shops of America*, Securities Act Release No. 4075 (May 6, 1959), the Commission held that a "major selling effort" would constitute a distribution, and in *Collins Securities Corp.*, Securities Exchange Act Release No. 11766 (October 23, 1975) [1975-76 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 80,327, *remanded on other grounds* 562 F.2d 820 (D.C. 1977), the SEC set out the following test:

> Rule 10b-6 . . . is designed to prevent manipulation in the markets. To that end, it precludes a person from buying stock in the market when he is at the same time participating in an offering of securities which is of such a nature as to give rise to a temptation on the part of that person to purchase for manipulative purposes. The term distribution in Rule 10b-6 should therefore be interpreted to identify situations where that temptation may be present.

The Commission also noted that "Rule 10b-6 undoubtedly applies to most registered offerings." *Id.*

It is clear that the American Leisure offering constituted a "distribution." Moreover, that distribution continued beyond March 25, 1980, the date of the pur-

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[4] For purposes of Rule 10b-6, the court holds Blinder, as the president and controlling officer of Blinder-Robinson, liable for the firm's misconduct. The evidence presented at trial shows that the firm's purchase of American Leisure units and its subsequent market manipulation was either known to Blinder or at his direction.

ported closing, because the purchases and subsequent sales of American Leisure units by Blinder-Robinson was a continuing after-market distribution of the securities. Rule 10b-6(c)(3) defines an underwriter's participation in a distribution as complete "when he has distributed his participation, including all other securities of the same class acquired in connection with the distribution. . ." According to the American Leisure prospectus, Blinder-Robinson's participation was the sale of 10 million units "to the public" (less 2 million units which were reserved for sale to BBB shareholders). (Plaintiff's Exhibit 1, at 46-7). With its purchase of 956,393 units, it fell short of completing its distribution by that amount and, consequently, the distribution continued after the purported closing. *R.A. Holman & Co. v. Securities and Exchange Commission*, 366 F.2d 446, 449 (2d Cir. 1966), *modified on other grounds*, 377 F.2d 665 (2d Cir. 1967), *cert. denied*, 389 U.S. 991 (1967); *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*; Whitney, "Rule 10b-6: The Special Study's Rediscovered Rule," 62 *Mich.L.Rev.* 567, 575 (1964). The parties stipulated that Blinder-Robinson would cease trading for its own account in American Leisure units beginning August 28, 1980. The court concludes that the after-market distribution lasted from March 25, 1980 until that date.

The court finds that during the continuing after-market distribution, defendants purchased and sold a large volume of American Leisure units. Those activities constitute the precise types of conduct forbidden by the rule, due to the potential for market manipulation by underwriters who stand to gain from an active market.

Defendants contend that the SEC has not established scienter for purposes of Rule 10b-6. Whether scienter is required under the rule has not been decided by the Sureme Court, and this court is aware of no lower court decision which has considered the issue since the Supreme Court's decisions in *Ernst & Ernst v. Hochfelder*,

and *Aaron v. Securities and Exchange Commission.* It is not necessary to reach that issue in this case, because the evidence reveals that defendants acted with scienter throughout their involvement with the American Leisure offering. This finding certainly applies to defendants' continuation of the distribution by virtue of their purchase of the remaining 956,393 units, and their subsequent purchase of additional American Leisure units.

Rule 10b-9. Under Rule 10b-9 a representation that an offering is on an "all or none" basis constitutes a manipulative or deceptive device prohibited by Section 10(b), unless prompt refunds are made to purchasers if all the securities are not sold at the specified price within the specified time and if the total amount due the seller is not received by it by the specified date. Defendants plainly violated this rule. They underwrote an offering on a "best efforts, all or none" basis; and they failed to promptly refund consideration received from purchasers when, on the specified deadline date, less than all of the securities had been sold, and less than the total proceeds due the seller had been received.

There is no dispute that this was an "all or none" offering, or that Blinder-Robinson failed to refund consideration paid by purchasers of American Leisure units. Defendants' position is that they had no obligation to refund the consideration. They contend that all 10 million units were sold by March 25, 1980; that all the money due the seller was received by that date; and hence, no refund was required.

The SEC has stated that "under Rule 10b-9, an offering may not be considered 'sold' for purposes of the representation 'all or none' unless all the securities required to be placed are sold in *bona fide transactions* and are fully paid for." Securities Exchange Act Release No. 11532 (July 11, 1975), 2 Fed.Sec.L.Rep. (CCH) ¶ 22, 730 (emphasis added). The Commission specifically in-

dicated that "sales designed to create the appearance of a successful completion of the offering, such as purchases by the issuer through nominee accounts or purchases by persons whom the issuer has agreed to guarantee against loss," are "non-bona fide sales." *Id.* The court finds that the last-minute transaction through which Blinder-Robinson "sold" almost 2 million units between March 21 and March 24, 1980, were not bona fide sales. *See Securities and Exchange Commission v. Coven*, 581 F.2d 1020, 1028, n.16 (2d Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); *Securities and Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1095 (2d Cir. 1972).

In addition, the SEC established at trial that the $25 million due American Leisure was not received by the deadline of March 25, 1980. On March 24, 1980, the Metro Bank issued Blinder-Robinson a cashier's check in the amount of $2,371,987.50 for the purchase by the firm of the 956,393 units which had not been sold to the public. Although Blinder-Robinson and the bank called this transaction a "loan," the court is persuaded that it was in fact a distribution of commissions from the proceeds of the offering, prior to its completion. Because this payment occurred prior to March 25, on that date the escrow account was short of the requisite $25 million. Moreover, proceeds received from non-bona fide sales must be considered non-bona fide proceeds which, even though present in the account on March 25, cannot be counted as part of the $25 million specified in the offering prospectus.

Section 15(c) and Rule 15c2-4. Rule 15c2-4, promulgated under Section 15(c) of the 1934 Act, requires the underwriter to establish and maintain an escrow account or separate bank account for all funds received, which funds must remain segregated and untouched until the occurrence of the "all or none" contingency which completes or vacates the offering. Blinder and Blinder-Robinson established an escrow account at the Metro

Bank and it appears that they deposited proceeds from sales into that account as they were received. However, the evidence shows that defendants transferred proceeds from the account prior to the occurrence of the "all or none" contingency on March 25, 1980, and failed to return purchasers' funds upon the occurrence of the contingency. The evidence demonstrates clear violations of Section 15(c) and Rule 15c2-4.

Proceeds were removed from the account, pursuant to defendants' instructions, on at least two occasions. On March 25, 1980, the bank wired $3 million from the escrow account to a Miami bank for use by American Leisure in order to accommodate a loan which the Miami bank agreed to make to Scope. On March 24, 1980, the bank made a purported "loan" to Blinder-Robinson, in which it actually distributed to the firm its commissions from the offering. Withdrawal of those funds prior to the sale of all 10 million American Leisure units was unlawful. *See Securities and Exchange Commission v. Coven*, 581 F.2d at 1028-29 n.17.

In an interpretive release, the SEC has stated that for purposes of Rule 15c2-4:

> If the contingency is "all or none," this requirement means that no funds may be disbursed from the agency or escrow account until all the securities are sold in bona fide transactions and are finally paid for.

Securities Exchange Act of 1934 Release No. 11532 (July 11, 1975). The court has determined that almost 2 million American Leisure units were sold in non-bona fide transactions, *supra*, at 19, which prohibited the completion of the offering and the lawful disbursement of funds from the escrow account to persons other than the purchasers. Yet, defendants failed to return purchasers' funds promptly after the deadline of March 25, 1980, and have not returned those funds to this day. Instead, having indirectly received their commissions through the

Metro Bank "loan," they turned over the remaining funds to the issuer. This is the precise conduct prohibited by Rule 15c2-4. *FAI Investment Analysts, Inc.*, Securities Exchange Act Release No. 14288 (December 19, 1977).

Aider and abettor liability. As a general defense to the violations which occurred during the American Leisure offering, defendants claim that they should not be held liable for the conduct of individual sales representatives. But, Blinder-Robinson is responsible for its employees' actions where those actions were directed by the firm, through Blinder. 15 U.S.C. § 78t (1976). *See* n.1, *supra*, at 12. The liability of Blinder, as president and controlling officer of Blinder-Robinson, is the same as that of the firm. *A.J. White & Co.*, 556 F.2d at 621-22; *Commonwealth Chemical Securities, Inc., supra.*

Defendants have not raised as an issue the extent of their liability as aiders and abettors for conduct of other involved persons, but that issue is relevant where, as in this case, liability under the securities laws is premised in part on contributing conduct by persons not before the court.[5] Specifically, between March 19 and March 25, 1980, Irwin Lampert met with Leon Joseph, Joseph Klein and Zola Klein to negotiate an arrangement whereby Scope would borrow $1.5 million and purchase 600,000 American Leisure units, and American Leisure would accommodate that bank loan by purchasing from the lending bank certificates of deposit in the amount of $3 million. On March 20, 1980, an assistant vice president of the Metro Bank wrote to the state securities regulation agency certifying the amount deposited in the escrow account as $25 million; on March 24, the bank made a

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[5] Defendants' violations of Sections 17(a) and 10(b), and Rules 10b-5 and 10b-6, result solely from their own misconduct. However, the violations of Section 15(c) and Rules 15c2-4 and 10b-9, involve misconduct of the Metro Bank and of the persons who arranged the loan to Scope.

purported "loan" to Blinder-Robinson which was actually a distribution from the proceeds of the offering; on March 25, the bank wired $3 million from the account for American Leisure to purchase certificates of deposit from the Miami bank; and on March 24 or 26,[6] the bank released the funds from the escrow account to American Leisure.

What is significant is that none of the above activities by third parties occurred in a vacuum. Rather, those activities were either at the direction of Blinder and Blinder-Robinson, or with their full knowledge and tacit approval; and the particular actions taken by the bank and others were simply component parts of the overall scheme which Blinder and Blinder-Robinson orchestrated to give the appearance of completing the offering by March 25, 1980. Under these circumstances, defendants are both directly liable as primary but silent participants, and secondarily liable as aiders and abettors. *Securities and Exchange Commission v. Coven*, 581 F.2d at 1028-29; *Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731, 740 (10th Cir. 1974).

Good faith reliance defense. The defense of good faith reliance on advice of counsel, raised by Blinder-Robinson, is without merit. Although several courts have held that reliance on the advice of counsel can contribute to a general "good faith" defense to certain violations of the securities laws, none has recognized that defense under facts such as are present in this case.

Blinder-Robinson contends that prior to purchasing American Leisure units, it sought legal advice as to the

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[6] The statement for the American Leisure escrow account reflects a debit of $22,130,276.72 on March 26, 1980. (Plaintiff's Exhibit 12f.) But, in a handwritten ledger for that account maintained by the Metro Bank International Department, the payment to American Leisure is shown to have occurred on March 24. (Plaintiff's Exhibit 12g)

propriety of such a purchase. It is undisputed that early in March, 1980, Meyer Blinder, acting for Blinder-Robinson, asked attorney Bernard Feuerstein to find out whether the firm, as the underwriter in a "best efforts, all or none" offering, could purchase the subject securities. In response to Blinder's request, Feuerstein did not render a formal opinion, but simply relayed the information received from a staff attorney at the SEC that there was no absolute restriction or special rule prohibiting an underwriter from purchasing the offered securities in an "all or none" offering. At no time did Blinder inquire as to the legality of other action it took to complete the offering by its deadline of March 25, 1980, and when later advised that a sticker should be placed on the prospectus, disclosing the purchase, Blinder-Robinson declined to follow that advice.

As discussed earlier in this opinion, the evidence supports a finding that Blinder-Robinson acted with scienter in all its violations of the securities laws. This finding of scienter precludes a finding of good faith by the firm with respect to the same actions. *See Securities and Exchange Commission v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980) (affirming district court's rejection of defense of good faith reliance on advice of counsel, "in view of the high ranking positions [defendant] held with the various companies engaged in the illegal activity and the specific finding of scienter made by the district court.").

There are additional reasons why the defense fails these defendants. A defendant invoking his reliance on the advice of counsel must establish that he made a complete disclosure to counsel and then followed the advice rendered. *Securities and Exchange Commission v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981) (*dictum*); *United States v. Hill*, 298 F. Supp. 1221, 1235 (D. Conn. 1969). Blinder did not make a complete disclosure to Feuerstein when he requested advice regarding the purchase of American Leisure units. He

indicated the possibility that Blinder-Robinson would buy units, but not that the firm would buy for its trading account and continue to sell the securities to the public after March 25, 1980. He did not disclose the possibility of accommodating loans to sell units to third parties, or that the firm would draw its commissions from the proceeds of the offering, prior to the closing, to purchase the American Leisure units. This information was material to the advice sought, and its omission precludes Blinder-Robinson from claiming reliance on that advice.

The greatest obstacle to Blinder-Robinson's claimed good faith defense is that the firm failed to follow the advice rendered by counsel. By March 20, 1980, Feuerstein and attorneys for Blinder-Robinson had advised Meyer Blinder and Mr. Padgett, vice-president of Blinder-Robinson that a sticker on the prospectus would be necessary to disclose the intended purchase, which the lawyers viewed as a material development. The firm specifically declined to follow that advice, for fear that disclosure of its intent to purchase units would injure its business reputation, and in the belief that no additional prospectuses would be distributed. It is plain that Blinder-Robinson cannot hide now behind legal advice which it chose to ignore. *Securities and Exchange Commission v. Senex Corp.*, 399 F.Supp. 497, 507 (E.D. Ky. 1975), *aff'd.*, 534 F.2d 1240 (6th Cir. 1976).

Upon the foregoing, it is

ORDERED, that the defendants, Blinder-Robinson & Co., Inc. and Meyer Blinder, and their officers, directors, agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them, and each of them, be and they are hereby permanently enjoined, from directly or indirectly, in connection with the offer to sell, sale, delivery after sale or purchase of any securities of any issuer whatsoever, including, but not limited to, units (of common stock and

thereto when the appropriate event or contingency has occurred.

Dated: June 8, 1982

BY THE COURT:

/s/ Richard P. Matsch
RICHARD P. MATSCH
Judge
United States District Court

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 17(a) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77q(a), provides:

§ 77q. *Fraudulent interstate transactions*

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b), provides:

§ 77t. *Injunctions and prosecution of offenses*

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the District Court of the United States for the District

of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), provides:

§ 78j. *Manipulative and deceptive devices*

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 15(c) of the 1934 Act, 15 U.S.C. § 78o(c), provides:

§ 78o. *Registration and regulation of brokers and dealers*

(c) (1) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security

(other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member by means of any manipulative, deceptive, or other fraudulent device or contrivance, and no municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this paragraph, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

Section 21(d) of the 1934 Act, 15 U.S.C. § 78u(d), provides:

§ 78u. *Investigations; injunctions and prosecution of offenses*

(d) Wherever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of

this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

Rule 10b-5 of the Securities Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5, provides:

§ 240.10b-5. *Employment of manipulative and deceptive devices.*

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-6 of the SEC, 17 C.F.R. § 240.10b-6, provides:

§ 240.10b-6. *Prohibitions against trading by persons interested in distribution.*

(a) It shall constitute a "manipulative or deceptive device or contrivance" as used in Section 10(b) of the Act for any person.

(1) who is an underwriter or prospective underwriter in a particular distribution of securities, or

(2) who is the issuer or other person on whose behalf such a distribution is being made, or

(3) who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution,

directly or indirectly, by the use of any means or instrumentality of interstate commerce of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution. . . .

Rule 10b-9 of the SEC, 17 C.F.R. § 240.10b-9, provides:

§ 240.10b-9. *Prohibited representations in connection with certain offerings.*

(a) It shall constitute a "manipulative or deceptive device or contrivance", as used in Section 10(b) of the Act, for any person, directly or indirectly, in connection with the offer or sale of any security, to make any representation:

(1) to the effect that the security is being offered or sold on an "all-or-none" basis, unless the security is a part of an offering or distribution being made on the condition that all or a specified amount of the consideration paid for such security will be promptly refunded to the purchaser unless (A) all of the securities being offered are sold at a specified price within a specified time, and (B) the total amount due to the seller is received by him by a specified date; or

Rule 15c2-4 of the SEC, 17 C.F.R. § 240.15c2-4, provides:

§ 240.15c2-4. *Transmission or maintenance of payments received in connection with underwritings.*

It shall constitute a "fraudulent, deceptive or manipulative act or practice" as used in Section 15(c)(2) of the Act, for any broker, dealer or municipal securities dealer participating in any distribution of securities, other than a firm commitment underwriting, to accept any part of the sale price of any security being distributed unless:

(a) the money or other consideration received is promptly transmitted to the persons entitled thereto; or

(b) if the distribution is being made on an "all-or-none" basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (1) the money or other consideration received is promptly deposited in a separate bank account, as agent or trustee for the persons who have the beneficial interests therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto, or (2) all such funds are promptly transmitted to a bank which has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein and to transmit or return such funds directly to the persons entitled thereto when the appropriate event or contingency has occurred.

TESTIMONY OF ALBERT BRENMAN
Attorney

* * * *

Q (By Mr. Vincent) Does that refresh your recollection as to when Mr. Raskin first told you that Blinder, Robinson might be purchasing the—

A I can clarify that by saying that the closing was scheduled for March 20th, as I recall, and it really extended for a period of two days. And I guess he must have talked to me on either the 20th before I went and attended the closing, or the day before.

Q He told you this. Did you discuss it with him at any length, this possibility?

A Yes.

Q Did you and Mr. Raskin reach any conclusions concerning this possible purchase by Blinder, Robinson?

A Well, we were concerned about whether the taking down of the units by Blinder, Robinson would be construed as not completing the distribution, and Mr. Raskin advised me that a number of years prior in his experience with other underwritings, that to complete the underwritings, the underwriter had to take down a small portion of the issue to complete it; somewhere around 10 percent, and that the NASD had told him verbally on such occasions that they had no objection to the underwriting taking down amounts up to about 10 percent of the issue.

Q What, if any, discussions did you have with Mr. Raskin concerning disclosing this purchase by Blinder, Robinson?

A Well, when we were advised that that was what was going to happen, we gave a great deal of thought to it and we felt and so advised Mr. Blinder that in our opinion and an amendment to the Prospectus by a sticker would be appropriate, and which would disclose the fact that Blinder, Robinson & Company had purchased

a—whatever percentage of the unsold units that remained unsold.

Q All right. You said you spoke to Mr. Blinder. Did you speak to him in person?

A I believe I advised Mr. Blinder of this in person or Jerry, one of the two of us spoke to him about it.

Q Well, do you remember specifically your telling him that?

A I don't specifically remember me telling it, but I might have told it to him.

Q Were you and Mr. Raskin present when he told him?

A At the closing, there were a lot of people coming and going, it would be at least—we spoke of a lot of things. We spoke to Mr. Blinder, we spoke to one another, we spoke to Mr. Greg Scott, Mr. Blinder's house counsel. It would be hard to say. As I recall, it was discussed with Meyer Blinder by either Mr. Raskin or myself.

I am sure Jerry discussed it with him, but I can't say with certainty I was present at the time he did that.

Q Did you discuss this with Mr. Padgett?

A I don't think I discussed it with Mr. Padgett, but Mr. Raskin has advised me that he had discussed it with Mr. Padgett. I did discuss it.

Q When you say "this," will you—

A I am referring to the sticker.

Q And did you discuss the need for a sticker with Mr. Erwin [sic] Lampert?

A I discussed this matter with Mr. Lampert, yes.

Q Do you recall when that occurred?

A That occurred on either March 20th or March 21st, the exact time I can't recollect.

Q And do you recall more specifically what your advice was to Mr. Blinder at that time?

A Well, after discussions with Mr. Raskin, we advised Blinder, Robinson or Mr. Blinder, Mr. Padgett, that in our opinion, it would be adviseable [sic] to sticker the Prospectus with information concerning the take down of the units by Blinder, Robinson.

Q What, if any, advice did you give concerning placing, or what type of account to place stock in?

A I didn't advise Mr. Blinder concerning that. I am sure Mr. Raskin advised him on that. He had done some research on it and told either Meyer or Mr. Padgett what his opinion was there.

Q Mr. Brenman, I would like to draw your attention to Page 34 of your deposition, starting with Lines 10 through 15. Would you read that, please.

A "We sold them—"

Q No, to yourself.

A All right. Okay.

Q Does that refresh your recollection?

A Yes. Mr. Blinder, Blinder, Robinson's officials were advised that our opinion was that sticker should be put on the Prospectus; that it would be advisable too that the shares, if reoffered or resold, should be resold at the public offering price of $2.50 per unit; that the units ought to be placed in the investment account and the fact that Blinder, Robinson is the owner of stock purchased warrants; that that should be set forth as information on confirmations and in addition that Blinder, Robinson could be construed as being in control of American Leisure. This was information that we recommended be put on confirmation so that any person purchasing the units would have that information.

Q Now, you advised these people. Now, what reply did you get, first from Mr. Blinder in response to your advice?

A Mr. Blinder said he would have to think about it.

Q When did he say that?

A When we advised him of this.

Q And that was either the 20th or the 21st?

A Uh-huh.

Q Did you have any subsequent conversations with Mr. Blinder?

A I didn't.

Q On this particular issue?

A I didn't, but Mr. Raskin did on the 24th.

Q But you did not?

A I did not.

Q Did Mr. Raskin report to you what those conversations were?

A Mr. Raskin reported to me that he had had a conversation with Mr. Padgett and Mr. Padgett stated that they had made a business decision: that they were not going to sticker the Prospectus.

* * * *

TESTIMONY OF E. RICHARD HOWSAM
Senior Vice President, Metro National Bank

* * * *

A Yes, we wanted to have more accounts, and since he was a principal in the company or an officer or an employee, we talked to him from time to time to try to get their accounts over at our bank.

Q Do you know where those accounts were prior to being moved to the Metro Bank?

A Offhand, I don't remember if they were all back east or if—I know they had some back east. I'm not sure if they had local accounts.

Q Were you aware that the back office operations, including most of the checking and banking functions, were being conducted back east on behalf of Blinder, Robinson & Company?

A That's where I think they originally started, the main operations were.

Q Did you or anybody else at the bank, to your knowledge, ever call back east to determine the credit standing of Blinder, Robinson & Company?

A Yes, we did. Before we made any loans to any individuals or to Blinder, Robinson, we had checked with their bank in New York as far as their credit and received very high references from them.

Q What does that mean, "very high references"?

A Their bank regarded them as a very creditworthy customer, always made payments, if they had loans, on time, carried good balances, recommended them as a customer.

Q So you had every reason to believe, didn't you, that Blinder, Robinson & Company was a pretty creditworthy customer?

A Based on our reference we checked, yes.

Q Okay. Do you recall Mr. Butch Gordon being in the Metro Bank during the week of March 17th, 1980?

A He was in there sometime during that week. I think that was near the week of the closing of the escrow. And he was there off and on.

Q Did there come a time when Mr. Gordon came into your bank with a Mr. Johan Van Baal?

A I'm not sure if he came in directly with him or how, but they were both there together.

Q Did you expect Mr. Van Baal to be coming to the bank?

A Butch told us he had a client or customer coming in he wanted to introduce us to.

Q And when was that?

A Approximately that week, sometime.

Q But it was prior to the time Mr. Van Baal came to the bank?

A I think so, uh-huh. I'm not sure exactly.

* * * *

TESTIMONY OF C. JAMES PADGETT
Executive Vice President, Blinder, Robinson & Company

* * * *

Q Okay. And where did this discussion take place?

A In the Fourth Floor conference room of the Metro Bank.

Q Do you recall what time of day it was?

A Late afternoon.

Q This was after the closing documents had been signed?

A That's correct.

Q As best as you can recall, please relate that discussion to us.

A Well, it was a discussion about whether or not a sticker was needed to be put on the Prospectus of American Leisure subsequent to the close, and it was really more of a disoriented discussion, I guess is the best way to describe it, because it didn't seem that anybody really had a clear understanding of exactly what should be done or why, and it was more or less left that way, that nobody was really sure.

Q Do you recall anything that Mr. Feuerstein said about the matter?

A It seems to me that at that time he was not too adamant that a sticker was necessary. I have learned since then that he may have changed his mind about that.

Q What about Mr. Brenman?

A Brenman was pretty firm on the idea that there should be a sticker, but he didn't seem to have good reasons why there should be one.

Q Do you recall what his reasons were?

A Basically that the fact that we had bought some of that issue as a material fact, and that the investor had a right to be informed of that, and we were asking which investors because we knew that 90-day period was over within a couple of days, and we didn't understand who he wanted us to send it to.

Q By that time, Blinder, Robinson had already made a purchase in the stock?

A Yes.

Q Now, Blinder, Robinson had executed a note on the 20th?

A That's correct.

Q In the amount of 2.5 million?

A Right.

Q How was that number selected? How did it come to be 2.5 million?

A I wasn't directly involved in the note itself, but I do remember some discussions; in fact, Jerry Raskin was the one, I believe, that was the firmest on the fact that as long as we purchased less than 10 percent of the issue, that it would fall within reasonable and prudent period from filing to the effective date with respect to the SEC approval; isn't that correct?

A [sic] Correct.

Q However, much of that delay was caused by the problems you were having with NASD over compensation; isn't that also correct?

A That was a part of it, yes.

Q Okay. Let's talk a little bit about that compensation. Now, the way it was originally structured, NASD determined that if you figure in the unaccounted for expense allowances, the discounts or commissions, and the underwriter warrants, they came out with a figure of about 16 percent compensation; isn't that fair?

A I think 16 is the figure that we've had on every issue that we've done, yes.

Q You say every issue you have done. Those are issues in the neighborhod of $1-$2 million; isn't that correct?

A That is correct.

Q And this deal was 25 million; isn't that correct?

A That is correct.

Q And basically, the NASD determined that 16 percent was excessive and thus unfair; isn't that correct?

A That is what they came back and said, yes.

Q Do you think that was a little greedy, Mr. Padgett?

A He certainly did.

Q Okay. Now, prior to March 17th, was Mr. Feuerstein and Mr. Lampert being contacted by Mr. Blinder to your knowledge just as a matter of precaution, if in fact the underwriting did not sell out and Blinder, Robinson might have to purchase? Is that a fair statement when I used the word "precaution"?

A Did he contact them about the issue of whether or not the underwriter could buy? Is that what you are saying?

Q Just as a matter of precaution.

A Prior to the 17th?

Q Right.

A I think that would be a fair statement.

Q Prior to the 17th, did Mr. Blinder ever make a statement to you that the last thing in the world he wanted to do was to purchase the remaining shares that were left unsold?

A Yes, he did, and I made the same statement to him.

Q Now, let's talk about the week of the 17th. Would it be a fair statement it was a very hectic week here in Denver; is that correct?

A I would say that is correct.

* * * *

Q Now, Blinder, Robinson eventually bought almost a million units in this offering, isn't that true?

A Just under a million, yes.

Q When did the possibility first come up that Blinder, Robinson might buy units of this offering?

A I believe the actual possibility of it happening was just about the 19th of March. We had had several

discussions about it prior to that. The idea that it was even possible to do so was something that had just come up sometime in early March, I believe.

Q Do you know how it came up?

A Well, my discussion with Mr. Blinder, which is where I first heard of it, he relayed to me that he and Irwin were having a discussion, and it was along the same—or about the same time that Elkins Stroud was talking about sending out that letter, and those sorts of things. And I guess Mr. Irwin Lampert and Mr. Blinder had a discussion, "Gee, if they cop out, why don't you guys buy it?" It was said as a joke at first, then Meyer said, "Do you know anything about whether we can buy it or not?" or "Why can't we buy it?" So I think we started looking into it from that point on.

Q When you say you looked into it, what did that involve? What exactly did you do?

A The primary thing that we did was to get ahold of the person that we thought was the most qualified to give us an answer, and that was Mr. Bernie Feuerstein of Delson & Gordon, whom we had known to be a securities expert.

Q Did you talk to Mr. Feuerstein?

A Before that specific question, no. I did speak to him about it several times later.

Q Who was involved in talking to Mr. Feuerstein initially about the issue?

A I believe Mr. Blinder initiated it.

Q When did you get involved?

A I hadn't met Mr. Feuerstein until he came to Denver, I believe, that same week of March 17th for the close and had several discussions with him at that time and subsequently.

Q Prior to that time, had you been advised that it would be appropriate for Blinder, Robinson to purchase shares in the offering?

A Yes, I was.

Q And who told you that?

A I heard it from Mr. Blinder.

Q And from where had he gotten that information, if he told you?

Q [sic] Was anyone else present when you asked Mr. Feuerstein to reverify this?

A Charles Trench was there. Mr. Blinder was there. There were other people around. I remember those two in particular.

Q Did Mr. Feuerstein do this?

A He sure did.

Q Did he do it in your presence?

A Yes, he did.

Q And what do you recall him saying, if anything?

A His end of the conversation was that he—he rephrased the same question that, I guess, you asked the same time before. The decision that an underwriter in a best efforts all or none issue could purchase stock in the closing of that issue.

Q How long did this telephone conversation last?

A Not very long.

Q I take it after that conversation you were satisfied it would be appropriate for Blinder, Robinson to purchase a portion?

A There was no question in my mind at that point.

Q Did Mr. Feuerstein mention to the SEC the amount of shares you contemplated purchasing?

A I don't believe he did. I had a conversation about that with another attorney that we were using at that time, Jerry Raskin, and he said that it was his opinion that if we bought less than 10 percent, that would be prudent.

Q Now, did Mr. Feuerstein tell you after he got off the telephone--or excuse me—during the telephone conversation, did you hear Mr. Feuerstein saying anything about where the stock had to be put or whether or not disclosures had to be made, or anything like that? Was he asking the SEC anything about any of those matters?

A Not to my knowledge.

Q Okay. Now, after this telephone conversation, I take it, he hung up the phone and said, "Now you can buy"?

A He said his advice was the same as it was prior to making that phone call.

Q Okay. Now, at that point, did he tell you, "But you have to put it here, you have to make this disclosure, you have to hold it for disclosure," or anything like that?

A No, I don't recall anything coming up about stickers or investment accounts until late Friday, the 21st, late in the afternoon, almost early in the evening.

Q Is that the next time you talked to Mr. Feuerstein about it?

A I believe so.

* * * *

TESTIMONY OF MEYER BLINDER
President and Chief Executive Officer,
Blinder, Robinson & Company

* * * *

Q And that was a deal between Beef & Bison Breeders, Inc., and American Leisure Energy Corporation?

A That's correct.

Q Why do you say you viewed the closing as the day you announced it?

A Well, when—we were all in a room and the final terms were finished, and everybody signs a document, the only thing remaining was for Beef & Bison to come up with the additional $200,000 in 30 days. I didn't think that we had a problem with that. Therefore, in my mind that was the closing date. And of course, legally, the closing date was probably 30 days after that, which of course I did not attend anymore.

Q Whose idea was it to make an announcement of that purchase?

A Mine.

Q Why was that?

A Because while we were sitting with the attorneys and talking out a deal, the other parties had about 11 people and they were all in another room, and as the deal seemed to be closing and getting close, they were running to the brokers, their own stockbrokers and their own friends and starting to spread rumors, and I said the stock started to rise. And I said you'd better disclose this now. I don't want to be held for inside information. And they agreed with me, the attorneys, and did make an announcement.

Q Were you represented by counsel at that period of time?

A No, I was not.

Q Why not?

A I didn't need any counsel. I wasn't doing anything. All I was doing was giving advice to Mr. Lampert.

Q Did you agree with Beef & Bison Breeders at that time that you would then underwrite some type of public offering to raise money for a hotel casino?

A Well, that was the idea if they had some land and they put together a decent company and got some good management in it, that I would consider underwriting that company.

Q And did American Leisure Energy Corporation become subsidiary of Beef & Bison Breeders, Inc.?

A Yes, it did.

Q Did it change its name?

A Yes.

Q Do you know why that happened?

A Because the name didn't fit a gambling casino.

* * * *

Q Yes.

A Yes.

Q And, as best you can recall, who did you talk to and what was said?

A Well, when we were getting ready for the closing on Wednesday, discussions came up during our signing of papers. Everybody was sitting around a long table,

a conference table, up on the fourth floor of the bank. And the conversation came up again. And I said to Mr. Feuerstein, "Are you positive that there is no problem with me taking down a block of the stock?"

And he says, "Absolutely not."

I says, "When did you talk to the SEC last?"

He says, "Last week." And he started telling me who he spoke to. Then he said he also spoke to somebody at the NASD.

And I said, "Well, I'd like to get it verified right here in this room so everybody can hear. Will you please do me a favor? Get on the phone and call Washington."

He did that at my request. I didn't hear the other side of the conversation. As a matter of fact, I couldn't hear much of his side of the conversation. Everybody was talking. There must have been eight, nine, 10 people in the room at that time. He gets off the phone and he made a statement. He said, "Absolutely no problem."

Q Now, was either Mr. Brenman or Mr. Raskin present during this situation?

A I believe Mr. Raskin was present.

Q Did he have anything to say about that?

A No, he did not. His only comment was that, "If the stock opens hot and you sell it above the 2.50 price, you could have some problems. But if it was sold under 2.50 to the public, you won't have a problem."

Q Now, do you recall any discussion of putting a sticker on the prospectus to reflect the contemplated purchase by Blinder, Robinson & Company?

A Not at that point in time.

Q When's the first time you recall a discussion about that matter?

A Sometime Friday afternoon, when the deal was closing and everybody was sitting around, waiting for the money to be wired from—the final funds to be wired from Florida for the Scope transaction, something came up about putting a sticker on. I kind of remember Brenman and Raskin talking about it. And Bernie

Feuerstein was there; Greg Scott was there, myself, and maybe Jim was there. I don't know exactly.

Q Well, what was Mr. Feuerstein's position with regard to the sticker?

A Well, when the discussion came up, I think it was Raskin asked me—or mentioned it. And I said to Raskin, "Now, wait a minute. I'm told after 90 days we did not have to sticker. Is that correct?"

And he says, "That's correct."

I says, "Well, by Monday, when we get this thing closed off, it'll be about 90 days. What's the reason for a sticker?"

I believe it was Brenman—I can't remember exactly —but I think he said, "Hey, the SEC will be looking down your pipes," something to that language. And he says, "Put the sticker on, anyway, whether the law says it has to be or not." He says, "Put the sticker on."

And, again, I said to him, I said, "Why do I need a sticker? Give me a good reason why I need it."

At that point, I turned to Bernie Feuerstein. I says, "Bernie, you're the expert. What do you think about a sticker? In 90 days it's up?"

He says, "Yeah, that's right, after 90 days there's no sticker necessary."

Then I turned back to him, and that conversation went up and back. We never got to any final decision, but I took the attitude that Bernie Feuerstein was the expert in SEC matters, and Brenman couldn't give me a good reason why we should put it on except that he was afraid of the SEC, and that's how we left it.

Q Did Mr. Brenman come over to the bank at your request Friday, late afternoon?

A Yes, that Friday night. Raskin had left. I think he left early Friday afternoon, or something like that. And we were getting ready to do the final documents. The bank assured us that they had spoken to each other and that the funds were on the way and there would be no problem. I don't know who suggested that we sign

all the papers. I was anxious to get back to California. And they would hold it in escrow until the funds would get wired in.

Q Now, did Mr. Raskin earlier in the day or Mr. Brenman that afternoon tell you that they thought Mr. Feuerstein's advice to you concerning the purchase of the stock was incorrect?

A No.

Q Did Mr. Scott ever tell you that?

A No.

Q Did anybody dispute that?

A No, there was no dispute on whether I could buy the stock. The only dispute that arose towards the final hours of the thing was whether we put a sticker on. And my understanding is if you put a sticker on, it calls for the—for a recision [sic] of the deal. If there was a recision [sic] of the deal necessary, my understanding is that the company could not close. The company had their expert attorney. If they couldn't close, they should have said, "Hey, if you don't put a sticker on it, can't close. That's the end of the deal."

Q Now, was Mr. Feuerstein there that Friday late, when you signed all the final papers?

A Yes, he was.

Q Was he aware that you were going to purchase the stock at that time?

A Yes, he was.

Q Did he tell you you shouldn't close?

A He did not.

Q And did Mr. Brenman show up there later that Friday evening?

A Yes, he did.

Q And did he know that you were buying the stock?

A Yes, he did.

Q Did he tell you you shouldn't close?

A No, he did not.

Q Now, did you get a call from your son sometime during Friday afternoon?

A Yes. He was in touch with me all day practically, calling me to find out how things were going; when we're going to physically close; he had an entry to do by Friday afternoon. We all knew at the last minute John Scarglet was going to come through, or Jim's man out in Switzerland was going to come through. The realization was that we would be buying a block of that stock, and we didn't know exactly how much. We knew it was under 10 percent. He wanted to know from me where do we put the stock.

Q And where did that conversation occur physically in the bank, if you recall?

A Well, during the day—of course, it was probably upstairs, and then towards late evening, when we finally got around to closing, that final conversation I just told you about was probably on the floor—well, not probably, but was on the fourth floor of the bank. The bank had been closed by this time, and everybody was standing around, kind of half dazed and half happy that everything was all over with and everything would be finalized.

Q And did Larry Blinder ask you what he should do with that stock?

A Yes, he did. He said, "Dad," he says, "I got the block of stock. Now what do I do with that stock?"

Q What did you tell him?

A I said, "Larry, put it in the investment account."

He said, "We don't have an investment account."

I said, "What kind of accounts do you have?"

He said, "I have a 60 account."

I said, "What's a 60 account?"

He said, "That's where the trading is done out of."

I said, "Put it in the 60 account. Let's forget about everything. Let's go home. It's time to go."

By this time, it was 7:00 o'clock in the evening, it was 5:00 o'clock out here. Everybody was beat. I was anxious to get back to California. And we said, "We'll straighten it out sometime next week."

I said, "What difference does it make? We're not going to sell the stock tomorrow, anyway."

Q Did you have any discussion with any of the other attorneys present at that time about where that stock should go?

A Yes. When he called me—as a matter of fact, I turned around to the group of attorneys that were all standing on the floor, and I says, "Hey, fellows, we discussed where to put the stock the other day." Irwin Lampert I think, on Wednesday, before he left, his opinion was that, "Put it in the trading account because if you put it in your investment account, you'll be cutting the issue short and it'll make it that much hotter on the street."

I think Raskin said, "As long as it don't open up at a premium, it don't make any difference."

Bernie Feuerstein said, "Hey, the deal is closed."

* * * *

Q And, initially Mr. Jacobson told you that he thought he could raise 14 million dollars himself, didn't he?

A That's correct.

Q And you indicated that you could probably raise 10 million dollars in a public offering, didn't you?

A That's correct.

Q I think you testified earlier, didn't you, Mr. Blinder, that when you put this deal together, that the idea of 14 and 10 eventually led to Mr. Jacobson not being able to obtain the 14 and, therefore, Blinder, Robinson was going to write it for about 25, isn't that correct?

A Well, steps along that line. It did not happen just that way, but, basically.

Q Also in the initial plan of total financing you were going to set up a unit structure whereby warrants could be exercised in the future, isn't that correct?

A That's correct.

Q And the reason for this was that you could raise an additional 60 million, which you felt was needed basically as seed money for this entire project, isn't that correct?

A Well, that's part of it. We also put a warrant on to give the public—When we raised the initial offering from a dollar to two and a half dollars, I felt that the public should get some additional shot, and that's the reason we gave them a warrant, so if the company is successful and the stock someday does as well as the resort stock would have done—that's what I kind of had in mind all the time—they would get something more out of it for helping it start. And that's why we added the warrants. And that would, then, of course, bring in additional capital for the company to be able to put up a hotel.

Q So early on in this entire structuring, the warrants played a very important role in this total financial package, didn't they?

A Sure. That's the way you structure a deal, with everything in mind from beginning to end. You don't start a deal and then expect it to fall on its behind in three days or a month or halfway through. We didn't want to have a hotel halfway up.

Q And that basic structure, that financing plan, never really changed, did it, from that point on?

A No.

Q Now, I believe you indicated earlier in your testimony that Mr. Jacobson did raise some money, didn't he, about $300, I think you said (sic)?

A About $300,000.

* * * *

TESTIMONY OF BERNARD FEUERSTEIN
Attorney

* * * *

Answer: The week after I got back?

Question: Yes.

Answer: I don't remember.

Question: Do you recall when the American Leisure offering closed?

Answer: By close, do you mean when it officially closed?

Question: Yes.

Answer: To the best of my recollection, it closed on the Monday after my return, which would have been on or about March 24th.

Question: How did you come about that information?

Answer: Because somebody told me that they—that there had been some stock that was being purchased but that the money had not yet reached the bank the close of business on the previous Friday, so that the closing documents could not be released but that on Monday I was told that the funds did come into the Metro Bank."

* * * *

PLAINTIFF'S EXHIBIT 12(b)

PURCHASER	FEE PAID	TELLER NO

loan proceeds

CASHIER'S CHECK

METROBANK
P.O. Box 5524
Denver, Colorado 80217

No. CL 7241

DATE MR. 24 80

23-134/103

[METROBANK LOGO]

PAY METROBANK $2,371,987.50 CTS

TO THE ORDER OF

BLINDER, ROBINSON & CO., INC.***

PURCHASER'S COPY
RETAIN FOR YOUR RECORDS
NOT NEGOTIABLE

/s/ [Illegible]
Authorized Signature

4/8/80 Per Mr. Howsom:

Loan was never booked. Funds were disbursed on March 24, 1980 and account of Blinder, Robinson & Co. was debited for the same amount on March 25, 1980. See attached copy of debit.

/s/ G.E.F.

PLAINTIFF'S EXHIBIT 12(c)

METROBANK Denver, Colorado

We have charged your account—loan payoff

Acct. No. 07-506-7

Date 3-25-80

Appd ct,

Amount $2,371,987.50

To Blinder Robinson & Co.
1860 Lincoln
Denver, CO 80202

:102001347: 07 506 7: 8:0237198758:

DO NOT FAIL TO MAKE THIS ENTRY IN YOUR CHECK BOOK

PLAINTIFF'S EXHIBIT 12(d)

Commissions [illegible] Ex. No. 1
D-1630—8-12-80

METRO NATIONAL BANK

LOAN APPROVAL & INFORMATION SHEET

GENERAL INFORMATION

Date—3/20/80

New—✓

Name—Blinder, Robinson & Co., Inc.

Address—1860 Lincoln
Denver, Colo. 80202

METRO BANK RELATIONSHIP

Comments: $2,371,987.50 Adv. into Blinder

CREDIT REQUEST

Amount—2,500,000

Rate—Prim.

Term—10 days

Collateral—UNS

Purpose—[Illegible]

Repayment—From Commission on Stock Issue

Committee Approval—/s/ [Illegible]

PLAINTIFF'S EXHIBIT 12(e)

Commission's [illegible] Ex. No. 15

Sys D-1630 8-12-80

PROMISSORY NOTE

$2,500,000.00 Denver, Colorado, March 20, 1980

10 days after date, for value received, the undersigned promise(s) to pay to the order of Metro National Bank of Denver, Colorado, the sum of Two Million Five Hundred Thousand and no/100s Dollars, with interest at the rate of *19% per annum until paid payable In a single payment at maturity.

*Interest rate shall remain at prime rate as quoted by First National Bank of Denver. The rate will be reviewed the first day of every month following any fluctuation in said prime rate. Current effective prime rate is 19%.

Payments when made shall be applied first to interest to day of payment computed upon unpaid balances and the remainder applied to principal. Failure to make any payment of principal or interest when due or any default under any encumbrance or agreement securing this Note shall cause the whole Note to become due at once, at the option of the holder of the Note. The maker(s) hereof waive presentment for payment, protest, notice of non-payment and of protest, and if this Note or any payment of principal or interest thereon is not paid when due, the undersigned agree(s) to pay reasonable attorney's fees not in excess of 15% of the unpaid debt after default.

BLINDER, ROBINSON & CO., INC.

/s/ Meyer Blinder, Pres.

Customer No. ————————

Loan No. ————————

ORIGINAL FOR BANK—COPY FOR BORROWER

PLAINTIFF'S EXHIBIT 24a

MEMORANDUM

TO: File

RE: Blinder, Robinson & Co., Inc.
American Leisure Corp.

FROM: Gerald Raskin

DATE: March 25, 1980

We have acted as counsel to Blinder, Robinson & Co., Inc. ("BR") with respect to certain aspects of the American Leisure Corp. ("ALC") underwriting. In connection with that transaction we understand that BR has consulted with BR's in-house counsel, Greg Scott, and with ALC's counsel, Bernard Feuerstein. The purpose of this memo is to capsulize the numerous conversations (both face to face and on the phone) with respect to the matters discussed below.

Just prior to the closing of the ALC transaction we became aware of the fact that it was contemplated that because of some cancelled orders, but principally because of the business failure of certain participating dealers and the decision of one of the participating dealers to sell substantially fewer ALC units than previously committed, a substantial number of ALC units were unsold.

Because of these unforeseen events, BR set about attempting to sell the unsold ALC units in order to close the transactions. Meyer Blinder, Jim Padgett and other personnel of BR have described to us the time and effort expended in selling the remaining ALC units.

Despite this tremendous effort BR was unable to sell the last 1,000,000 ALC units to the public. BR then made the decision, after all other possibilities BR considered practical were exhausted, that BR would purchase the remaining unsold ALC units inventory. These amounted to approximately 1,000,000 units at a cost of

$2,500,000, or approximately 10% of the ALC units offered to the public.

Apparently while the decision was being considered Bernard Feuerstein, counsel to ALC, called a senior attorney at the NASD in New York and indicated the proposed course of action. Bernie has told me that the NASD informally told him that it would have no objection but that it would be concerned if the issue opened at a premium because of potential "parking" problems. Bernie also called the S.E.C. concerning stabilization problems and was informed, also on an informal basis, that no stabilization seemed to be involved in the proposed purchase by BR. BR never consulted us about these matters prior to the closing.

As noted above, we were informed by Bernie of the proposed purchase by BR just prior to the closing.

After much consideration by our firm we informed Meyer Blinder on March 20 and 21 at the closing and by phone on March 24 that the purchase by BR was a material event which, in our opinion, required a "sticker" to be added to the ALC prospectus. We feel that the purchase of approximately 10% of the issue by the underwriter in a best efforts, all or none underwriting should be brought to the intention [sic] of the market and that appropriate disclosure should be made. The purchase by BR may be considered an integral part of the actual distribution of the securities which, even though brought on by unforeseen circumstances, should be filed with the S.E.C. in at least the form of a "sticker." (Since the ALC units include warrants there is a continuing offer of securities which requires an updating of the ALC prospectus for all material events at least until the last of the warrants expire).

We have further informed BR (Meyer Blinder, Jim Padgett and Gregg Scott) that if the ALC units purchased by BR are placed in inventory we believe it is appropriate that they be resold at no more than the public

offering price of $2.50 per unit. The possibility of resales at prices higher than $2.50 obviously was a concern of the NASD in its conversation with Bernie. Further, BR mainly attempted to sell the remaining ALC units in large blocks although Jim Padgett has told me today that attempts were made to sell these units to the public in small denominations. We understand the reasons why BR proceeded as it did, particularly its attempt to use its best efforts to sell the issue in accordance with its obligations to ALC. Notwithstanding its motives, in view of the interest and publicity concerning this issue we told Meyer Blinder on March 20 and 21 and Padgett on March 24 and 25 that the S.E.C. might pay particular attention to this issue. We further pointed out that if there were any problems in connection with the distribution the NASD and S.E.C. might try to close BR.

Today, March 25, I again went through our position with Padgett and Scott in a conference call. In summary, I told Padgett that he understood our positions. He said he understood. I then stated that he understood our position and the reasons therefor, that he (BR) however had made a business decision that the sticker was unnecessary because of the reasons he gave (business disaster to inform other brokers that BR held 1,000,000 units which it had to sell at $2.50 per share). I then pointed out, as I previously had to Scott, that the confirmations to be used for ALC transactions should be appropriately coded to indicate market maker status, that BR owned warrants and that BR might be deemed in control of ALC.

Padgett informed me that the market had been opened by other brokers and that trading had started below the offering price.

/s/ Gerald Raskin
GERALD RASKIN

Approved:

/s/ Albert Brenman
ALBERT BRENMAN

Administrative Proceeding
File No. 3-6380

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Jun. 27, 1984

(8-15727)

IN THE MATTER OF

BLINDER, ROBINSON & CO., INC.
MEYER BLINDER

ORDER FOR PUBLIC PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTIONS 15(b) AND 19(h) OF THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED

I.

The Commission's public official files disclose that:

A. Blinder, Robinson & Co., Inc. ("Registrant"), a New York corporation having offices in Englewood, Colorado and elsewhere, became registered with the Commission on April 22, 1970 as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934, as amended ("Exchange Act") and is still so registered.

B. Registrant is a member of the National Association of Securities Dealers, Inc. ("NASD"), a national securities association registered pursuant to Section 15A of the Exchange Act, and has been at all times pertinent hereto.

C. Meyer Blinder ("Blinder"), Pompano Beach, Florida, has been the president and a director of Registrant since its inception and directly and indirectly is the beneficial owner of more than 25% of Registrant's outstanding common stock.

D. American Leisure Corp. ("American Leisure"), a New Jersey corporation engaged in the business of constructing and operating a casino in Atlantic City, New Jersey, filed an S-1 Registration Statement with the Commission which became effective on or about December 26, 1979. Commencing on or about that date, American Leisure made a public offering of 10,000,000 units of its securities at a price of $2.50 per unit on a "Best Efforts, All or None Basis." Each unit consisted of one share of common stock, one "A" warrant and one "B" warrant. Registrant was the underwriter for the American Leisure offering.

II.

As a result of an investigation, the Division of Enforcement alleges that:

A. On June 8, 1982, a Judgment of Permanent Injunction was entered by the U.S. District Court for the District of Colorado against Registrant and Blinder enjoining them from future violations of Section 17(a) of the Securities Act 1933, as amended ("Securities Act"), and Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5, 10b-6, 10b-9 and 15c2-4 promulgated thereunder.

B. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 17(a)(1) of the Securities Act in that, in the offer and sale of certain securities, namely the units, common stock and warrants of American Leisure, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, they directly and indi-

rectly employed devices, schemes and artifices to defraud. As part of the aforesaid conduct, said persons would and did, among other things:

1. Practice a program of deliberately deceptive misinformation, as more fully described in subparagraphs II. B. 6. through II. B. 9., below;

2. Purchase American Leisure securities to create the pretense that all 10,000,000 units of said American Leisure offering had been sold to the public on or before the March 25, 1980 deadline;

3. Use proceeds from said American Leisure offering as an accomodation [sic] for loans to finance purchases of American Leisure securities by others to create the pretense that all 10,000,000 units of said offering had been sold on or before the March 25, 1980 deadline;

4. Cause Registrant's underwriting commission to be disbursed from the bank escrow account for said offering prior to the deposit of $25,000,000 in offering proceeds into said account contrary to the "all or none" contingency;

5. Continue the distribution to the public of said American Leisure securities after the announced completion of the distribution;

6. Make statements to customers that the hotel-casino development planned by American Leisure would be assured because of deals that were being made when, in fact, no deals were being made;

7. Make predictions to customers that the price of the aforesaid American Leisure securities would open at a premium in the aftermarket, without a reasonable basis in fact for such predictions;

8. Make statements to customers that Blinder Robinson personnel had inside information about de-

velopments positively affecting American Leisure when in fact there were no such positive developments;

9. Omit to state the following material facts, among others, necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading:

a. American Leisure and Cavanagh Communities Corp. ("CCC"), which own neighboring parcels of land in Atlantic City, New Jersey had preliminary, tentative discussions concerning joint development of their properties but no agreements or preliminary undertakings resulted from those discussions and those discussions have been terminated;

b. Registrant itself would purchase 956,393 American Leisure units during said American Leisure offering;

c. $3,000,000 of the proceeds of said American Leisure offering had been committed to be used as an accommodation for the bank loan necessary for Scope, Inc.'s purchase of 600,000 American Leisure units with half of the $3,000,000 invested in a certificate of deposit at six (6) points below the market rate;

d. Metrobank, escrow agent for the said American Leisure offering, was so anxious to assist its good customers, the Registrant, that it found it expedient to make a $700,000 loan to a person who had no prior banking connection there to enable him to purchase 400,000 units in the American Leisure public offering;

e. Metrobank loaned Registrant almost the full amount of its commission to finance its purchase of 956,393 American Leisure units with

Metrobank paying itself off from that commission in immediate distribution of the escrow account;

f. Registrant would place the 956,393 American Leisure units it would purchase in said offering in its inventory account to participate in aftermarket transactions; and

g. Even though all the 10,000,000 units publicly offered by American Leisure had not been sold to the public in *bona fide* transactions by the March 25, 1980 deadline, investors' monies would not be returned to them contrary to the "all or none" contingency of said offering.

C. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act in that, in the offer and sale of certain securities, namely the units, common stock and warrants of American Leisure, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, they directly and indirectly, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and a course of business which would and did operate as a fraud and deceit upon the purchasers of such securities. As a part of the aforesaid conduct, said persons, among other things, would and did engage in the acts and practices described in paragraph II. B., above.

D. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that, in connection with the purchase and sale of certain securities, namely, units,

common stock and warrants of American Leisure, by use of the means and instrumentalities of interstate commerce and, by use of the mails, they directly or indirectly employed devices, schemes, and artifices to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and engage in acts, practices and a course of business which would and did operate as a fraud and deceit. As part of the aforesaid conduct, said persons, among other things, would and did engage in the acts and practices described in paragraph II B., above.

E. From on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 10(b) of the Exchange Act and Rule 10b-6 thereunder in that they used, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, and in connection therewith Registrant and Blinder, who were underwriters in a distribution of units, common stock and warrants of American Leisure, directly and indirectly, by the use of means and instrumentalities of interstate commerce, and of the mails, with one or more other persons, bid for and purchased for accounts in which they had a beneficial interest, and induced others to buy, said American Leisure securities which were the subject of such distribution, prior to the completion of the participation of Registrant and Blinder in such distribution.

F. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 10(b) of the Exchange Act and Rule 10b-9 promulgated thereunder in that they used, in connection with the purchase and sale of certain securities, namely, the units, common stock and warrants of American Leisure, manipulative and deceptive devices and contrivances, and in connection therewith, Registrant

and Blinder, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, represented that the said securities of American Leisure were being offered and sold to the public on an "all or none" basis when, in fact, (1) less than all the securities offered had been sold within the specified time; (2) less than all the proceeds due the seller had been received within the specified time; and (3) all the monies were not returned to purchasers in the offering as the prospectus for the said offering represented would be done, all in violation of the aforesaid section and rule.

G. From on or about December 26, 1979 to on or about August 28, 1980, Registrant willfully violated and Blinder willfully aided and abetted violations of Section 15(c) of the Exchange Act and Rule 15c2-4 promulgated thereunder in that Registrant, while participating as an underwriter in a distribution of the units, common stock and warrants of American Leisure on an "all or none" basis with the provision that all sales proceeds would be transmitted to and maintained in a bank escrow account until (1) the entire offering was sold within a specified time, in which event the monies would be disbursed from the escrow account to another escrow account; or (2) the entire offering was not sold within the specified time, in which event the monies would be promptly refunded to the purchasers of the securities, accepted money from sales of such securities even though:

1. Monies were disbursed from the escrow account prior to the occurrence of the "all or none" contingency; and

2. The monies were not promptly refunded to purchasers in the offering even though the offering was not sold within the specified time.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest and for the protection of investors, that public proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true, and in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 19(h) of the Exchange Act.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before an Administrative Law Judge to be designated by further Order as provided by Rule 6 of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Respondents file an answer to the allegations contained in this Order for Proceedings within fifteen (15) days after service upon them of said Order as provided by Rule 7 of the Commission's Rules of Practice. If the Respondents fail to file an Answer or fail to appear at a hearing after being duly notified, they shall be deemed in default and the proceeding may be determined against them upon consideration of this Order for Proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This Order shall be served upon Respondents' Registrant and Blinder personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceedings will be permitted to participate or advise in the decision upon this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.

/s/ George A. Fitzsimmons
GEORGE A. FITZSIMMONS
Secretary

Office-Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-649 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO., INC. AND MEYER BLINDER,
PETITIONERS
v.
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly enjoined petitioners from committing further violations of the federal securities laws on the basis of findings that supported a conclusion, although not expressly stated, that petitioners were likely to commit such violations in the future.

2. Whether the district court correctly concluded that petitioners violated antifraud and antimanipulation provisions of the federal securities laws.

3. Whether the district court's rejection of petitioners' defense of reliance on counsel is clearly erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-649

BLINDER, ROBINSON & CO., INC. AND MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-6a) and the district court (Pet. App. 9a-36a) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1983. A petition for rehearing was denied on July 23, 1984 (Pet. App. 7a-8a).[1] The petition for a writ of certiorari was filed on October 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]A second petition for rehearing, filed July 31, 1984, is still pending before the court of appeals.

STATEMENT

1. Petitioner Blinder, Robinson & Company (Blinder, Robinson) is a broker-dealer registered with the Securities and Exchange Commission. Petitioner Meyer Blinder is its president and principal shareholder. Pet. App. 9a. In 1979, Blinder, Robinson entered into an agreement with American Leisure Corporation (ALC), a new business with no operating history, to act as underwriter for a $25 million public offering of its securities (*id.* at 10a-11a).

The offering, consisting of 10 million units of one share of common stock and two warrants priced at $2.50 per unit, was on a "best efforts, all or none basis" (Pet. App. 10a). If all of the units were not sold to the public during the 90-day period during which the offering would be open, all proceeds would be returned and the offering terminated (*id.* at 11a). The prospectus represented that all funds received from investors would be deposited in an escrow account in Metro National Bank of Denver, Colorado (C.A. App. 613).

Because the offering was on an all-or-none basis, petitioners' compensation was largely contingent on its success. If it were able to sell the offering, Blinder, Robinson would receive $2.25 million in commissions plus $250,000 for expenses. If the offering failed, the firm would receive only $25,000 and be reimbursed for certain expenses. C.A. App. 614, 709, 724.

Despite a vigorous sales campaign — which included misrepresentations and fraudulent price predictions (Pet. App. 19a) — petitioners could not sell the entire offering to the public by the closing date of March 25, 1980 (*id.* at 15a). Rather than return investors' funds, however, they contrived a series of non-bona fide transactions in the final days before the closing date to create the impression that the all-or-none contingency had been satisfied (*id.* at 27a-28a).

In one of these transactions, ALC itself indirectly financed a purchase of 600,000 units by Scope, Inc., which borrowed the necessary $1.5 million from a Florida bank. As an accommodation for this loan, ALC agreed to deposit $3 million with the bank, half of which would earn interest at a below-market rate of 2% less than the rate being charged Scope. Pet. App. 16a. In another transaction, proceeds from a Metro National Bank loan facilitated by a Blinder, Robinson sales representative were used to purchase another 400,000 units of the offering (*ibid.*).

A third transaction involved Blinder, Robinson's own purchase of 956,393 units, slightly less than ten percent of the offering. Although petitioners purported to pay for this purchase with the proceeds of an unsecured loan from Metro National Bank, the funds were in fact an improper advance on Blinder, Robinson's unearned commissions out of the escrow account. Pet. App. 16a, 28a-29a. Contrary to the advice of counsel, petitioners placed these units in Blinder, Robinson's trading account for immediate resale to the public (*id.* at 16a; C.A. App. 205, 434). After the deadline for the closing of the offering, Blinder, Robinson distributed ALC securities to the public from its trading account and simultaneously began purchasing ALC securities in the over-the-counter market and making a market in the securities (Pet. App. 17a, 24a-25a).[2] Contrary to the advice of counsel, petitioners made a "business decision" not to supplement the prospectus. Accordingly, investors were not informed of the circumstances under which 20% of the units were deemed sold in the final days before the offering was to be closed. *Id.* at 21a-23a, 33a.

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[2]A dealer "makes a market" in a security when it holds itself out as willing to buy and sell that security on a regular basis for its own account.

2. The Commission brought this action in the United States District Court for the District of Colorado, alleging that petitioners and others[3] violated antifraud and antimanipulation provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations thereunder in connection with the ALC offering.[4]

a. Following a nonjury trial, the district court found that petitioners had violated each of the charged provisions (Pet. App. 18a, 24a-25a, 27a, 28a-29a). The court found that petitioners' sales force followed "a program of deliberately deceptive misinformation which Blinder orchestrated" and that petitioners concealed "the frantic manipulations which resulted in the pretension that all of the issue had been sold by the March 25 deadline" (*id.* at 21a).[5] The court also concluded that, by purchasing 956,393 units for their trading account, petitioners fell short of selling out the offering by the closing date (*id.* at 26a). "[C]onsequently, the distribution continued after the purported closing" on March 25, and petitioners violated Rule 10b-6 (17 C.F.R. 240.10b-6) by making a market in ALC securities after that date (Pet. App. 26a).

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[3]The other defendants entered into consent decrees with the Commission.

[4]The complaint charged violations of the following provisions, which are set forth at Pet. App. 37a-42a: Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Sections 10(b) and 15(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78*o*(c); and Rules 10b-5, 10b-6, 10b-9, and 15c2-4, 17 C.F.R. 240.10b-5, 240.10b-6, 240.10b-9, 240.15c2-4.

[5]In this regard, the court recognized (Pet. App. 22a) the importance of the "all or none" contingency to investors:

> [I]n an "all or none" offering of securities by a new company, whether all the securities have been sold to the public in bona fide transactions is of particular importance because the "all or none" contingency is the investors' principal protection. Each investor is comforted by the knowledge that unless his judgment to take the risk is shared by enough others to sell out the issue, his money will be returned.

The court rejected petitioners' defense of reliance on advice of counsel, finding that, having failed both to make complete disclosure to counsel and to follow counsel's advice (Pet. App. 31a-33a), petitioners "cannot hide now behind legal advice which [they] chose to ignore" (*id.* at 33a). The court emphasized that petitioners' mental state went beyond recklessness: "throughout their involvement with the [ALC] offering," petitioners "acted with a knowing 'intent to deceive, manipulate, or defraud' " (*id.* at 27a, 24a (citation omitted)). The court enjoined petitioners from future violations of the antifraud and antimanipulation provisions of the federal securities laws (*id.* at 33a-36a).

b. The court of appeals affirmed (Pet. App. 1a-6a). The court upheld the district court's factual findings and its conclusion that petitioners had violated federal law as charged by the Commission (*id.* at 2a, 3a-5a). In affirming the injunction, the court concluded that "[t]he findings of the trial court * * * are sufficient to support the injunctive relief," noting in particular "the nature of the violations, the knowledge that certain actions were in violation, [the] placement of the shares purchased in the trading account, the deliberate deception by the sales force and the finding by the trial court on scienter" (*id.* at 5a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' contentions do not merit further review.

1. Petitioners argue (Pet. 6-10) that the district court erred in enjoining them from committing further violations of the antifraud and antimanipulation provisions of the federal securities laws without an express finding concerning the likelihood that their violations would recur. Petitioners do not contend that the evidence is insufficient to

establish the likelihood of future violations, nor do they claim that the district court's findings of fact are insufficient to support such a conclusion. Rather, they argue only that the district court committed reversible error by failing to make that conclusion explicit. This argument is without merit.

The standard for issuing an injunction against future violations of the law is whether "the inferences flowing from the defendant's prior illegal conduct, viewed in light of present circumstances, betoken a 'reasonable likelihood of future transgressions.' " *SEC* v. *Zale Corp.*, 650 F.2d 718, 720 (5th Cir.), cert. denied, 454 U.S. 1124 (1981). The findings of the district court are more than adequate to support such a conclusion here. The district court found, and the court of appeals agreed, that petitioners, who are securities professionals, engaged in a deliberate scheme to mislead investors, in the course of which they violated numerous provisions of the federal securities laws. See pages 2-5, *supra*. Petitioners' violations continued until they entered into a stipulation with the Commission to cease trading ALC securities five months after the purported closing of the offering (Pet. App. 26a). Under these circumstances, a finding of the likelihood of future violations, which was in any event implicit in the district court's findings and its order,[6] was surely supportable. The court of appeals properly noted that where, as here, the district court's factual determinations are adequate and supported by the record, "[n]o particular recitations are required" (*id.* at 6a). Accord *SEC* v. *Savoy Industries*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979)

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[6]See *SEC* v. *Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). Petitioners do not contend that the district court was unaware of the correct legal standard for the issuance of injunctions against future violations.

("The absence of an express finding on the probability of future violations by the district court does not impair our ability to sustain the district court's injunction where the necessary factors are so obviously present.").[7]

2. Petitioners argue next (Pet. 10-13) that the district court erred in holding that their own purchase of over 950,000 units of the ALC offering violated the securities laws. But the courts below did not conclude that this purchase itself violated the law. Rather, it was petitioners' market-making activities during the pendency of the offering that were found to have violated Rule 10b-6, 17 C.F.R. 240.10b-6. See Pet. App. 4a, 26a. "Rule 10b-6 is an antimanipulative provision designed to protect the orderliness of the securities market during distributions of stock" by "maintaining an orderly market * * * free from artificial or manipulative influences." *Piper* v. *Chris-Craft Industries,* 430 U.S. 1, 43, 45 (1977) (footnote omitted). Under the Rule, an underwriter may not commence market making before "he has distributed his participation" in the offering. 17 C.F.R. 240.10b-6(c)(3)(ii). Petitioners' distribution was not complete at the time of the purported closing of the offering because their own purchase of the units was not for investment, but for the purpose of continued sales to the public. See 17 C.F.R. 240.10b-6(c)(3)(iii). Accordingly,

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[7]Petitioners' reliance (Pet. 8) on *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978), is misplaced. There, an injunction was modified to exclude two defendants because of their limited connection with the unlawful activities and because the Commission had failed to make a sufficient showing of the likelihood of future violations (*id.* at 100-101). The case does not stand for the proposition that an explicit finding is required where the evidence is sufficient to support an inference of the probability of future violations. Indeed, the Second Circuit has upheld injunctions in such circumstances without an explicit finding by the district court. See *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807-808 (1975); *SEC* v. *Culpepper, supra.*

regardless of whether petitioners paid full purchase price for the units (see Pet. 11-12), their market-making activities after the purported closing date were squarely prohibited by the Rule. See *Piper*, 430 U.S. at 43; *Batten & Co.* v. *SEC*, 345 F.2d 82, 84 (D.C. Cir. 1964); *SEC* v. *R.A. Holman & Co.*, 366 F.2d 446, 449 (1966), modified on other grounds, 377 F.2d 665 (2d Cir.), cert. denied, 389 U.S. 991 (1967).[8]

3. Finally, petitioners argue (Pet. 13-17) that they did not act with scienter because they relied in good faith on the advice of counsel. The district court correctly rejected this defense on the facts (Pet. App. 31a-33a), and the court of appeals upheld its findings (*id.* at 2a, 5a). The claim that the district court's findings are clearly erroneous does not merit further review. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938).

The district court found that petitioners did not rely in good faith on the advice of counsel. In requesting advice regarding the firm's purchase of ALC units, petitioners failed to make complete disclosure to counsel,[9] and "[a]t no time did Blinder inquire [of counsel] as to the legality of other action it took to complete the offering by its deadline"

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[8]Petitioners also clearly violated Rule 10b-9, 17 C.F.R. 240.10b-9, by failing to make refunds after the offering failed to sell (Pet. App. 4a, 27a-28a). They do not allege any conflict among the circuits with respect to the interpretation of the Rule; that this case is not factually identical to other cases involving the Rule does not, as petitioners suggest (Pet. 11-12 n.18), detract from their violations. Contrary to petitioners' contention (Pet. 12-13), this case does not present the question whether scienter is an element of a violation of Rules 10b-6 or 10b-9. The district court found that petitioners acted with scienter in all of their violations (Pet. App. 26a-27a, 32a).

[9]Petitioners did not inform counsel of the firm's intent to buy the ALC securities for its trading account (rather than its investment account) and to continue selling them to the public, of the source of their funds for the purchase, or of the possibility of accommodating loans to induce purchases by third parties (Pet. App. 32a-33a).

(Pet. App. 32a). Most telling, petitioners "failed to follow the advice" that was given by counsel (*id.* at 33a). In particular, they refused to follow counsel's advice to update the offering prospectus to inform investors of their purchase of over 950,000 units (*ibid.*). Having made a business decision not to follow that advice, Blinder, Robinson "cannot hide now behind legal advice which it chose to ignore" (*ibid.*). Accordingly, this case does not present any issue with respect to the effect of a defendant's reliance on counsel. See *SEC* v. *Savoy Industries,* 665 F.2d 1310, 1314-1315 n.28 (D.C. Cir. 1981); *Arthur Lipper Corp.* v. *SEC,* 547 F.2d 171, 181-182 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978); *SEC* v. *Senex Corp.,* 399 F. Supp. 497, 507 (E.D. Ky. 1975), aff'd, 534 F.2d 1240 (6th Cir. 1976). Petitioners' claim to the contrary is simply an attempt to reargue the facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ROSALIND C. COHEN
Assistant General Counsel

APRIL MCGUIGAN
Attorney
Securities and Exchange Commission

NOVEMBER 1984

DOJ-1984-11

(3)

Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO., INC.
AND MEYER BLINDER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF

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December 14, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-649

BLINDER, ROBINSON & CO., INC.
AND MEYER BLINDER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF

Petitioners respectfully file this reply to the Opposition to the Petition for Certiorari filed by the Securities and Exchange Commission ("SEC").

1. Respondent's characterizations of petitioners' positions regarding the district court's erroneous grant of injunctive relief in this case are incorrect. Contrary to respondent's statement (Opp. at 5-6), petitioners have contended, and will continue to contend upon remand, that the evidence before the district court is insufficient to establish the likelihood of future violations by respondents, and that the district court's findings of fact are

insufficient to support such a conclusion.[1] The issue warranting a grant of certiorari in this case is, however, of much broader applicability to a wide range of cases in which injunctive relief is sought by the SEC, other governmental agencies, or private parties: The adherence by the district courts and the courts of appeals to this Court's unequivocal holding that the issuance of an injunction must be predicated on factual findings that there is a reasonable likelihood of proscribed conduct in the future. That requirement was ignored by the lower courts in this case. Only by reaffirming the applicability of this rule will this Court ensure conformance with it.

2. Respondent argues that the district court's finding of a violation of Rule 10b-6 was correct because "[p]etitioners' distribution was not complete at the time of the purported closing of the offering because their own purchase of the units was not for investment, but for the purpose of continued sales to the public." (Opp. at 7.) Assuming that the Commission has correctly stated the law, it is clear that the district court did *not* find a violation on this basis. To the contrary, the court found a violation of Rule 10b-6 solely because (i) Blinder, Robinson purchased 956,393 units,[2] and (ii) the firm "*purchased* and sold a large volume of American Leisure units" in the after-market. (App. 26a, emphasis added.)

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[1] Respondent is also incorrect when it states that petitioners do not contend that the district court was unaware of the correct legal standard for the issuance of injunctions against future violations. Respondents have no basis for making assertions one way or the other about the state of awareness of the district court. Respondents do contend, however, that regardless of the district court's state of awareness, that court and the court of appeals erred in allowing an injunction to issue without the requisite finding of facts to support it.

[2] The court stated: "With its purchase of 956,393 units, it fell short of completing its distribution by that amount and, consequently, the distribution continued after the purported closing." (App. 26a.)

In order to meet the standard set forth by respondent itself, the district court had to find that the firm's purchase of American Leisure units was, in the Commission's words, "for the purpose of continued sales to the public." [3] No such finding was made. Indeed, the district court never even found that Blinder, Robinson's after-market sales exceeded its after-market purchases. Without a finding that petitioners' purpose in purchasing a portion of the offering was not for investment, the rule applied by the district court is, in effect, that any purchase by an underwriter and market maker of part of the offering violates Rule 10b-6. This rule is not only wrong, but it threatens to convert a common practice of underwriters into a newly created violation of the securities laws.

3. Respondent deals with petitioners' contention regarding reliance on counsel by misconstruing it. Petitioners do not suggest that the district court did not find that respondents made a business decision not to "sticker" or update the prospectus in the face of suggestions by some (but not all) counsel that this was advisable. This advice, however, *had no bearing on the determination whether or not to close the issue.* It was this latter determination, *on which there was no contrary advice from counsel in the evidence or found by the district court,* that later formed the basis of most of the securities law violations found by the district court. Petitioners' reliance on counsel with regard to the closing of the offering is manifestly clear from the deposition testimony of one of their attorneys, Mr. Robert Shaftan, who was present

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[3] Petitioners reiterate the point made in the original Petition that a violation of Rule 10b-6 requires a finding of *scienter,* an issue which this Court has yet to address. (*See* Petition at 12-13.) Petitioners' reliance on advice of legal counsel that the distribution of American Leisure units had been completed, discussed in the Petition (at 13-16) and in point 3 below, precludes any *scienter* with regard to purported violations of Rule 10b-6.

at two meetings involving at least four lawyers at which it was determined that the offering could close. Mr. Shaftan testified at deposition that Mr. Bernard Feuerstein, an attorney hired by petitioners for his expertise in the securities area, left no doubt that the closing could go forward:

> "Q: As best you can recall, Mr. Shaftan, what was discussed at that meeting at the Brown Palace [Hotel] regarding the possibility of Blinder, Robinson's purchase of stock?
>
> "A: It was indicated, it was stated that Blinder, Robinson was buying a million shares.
>
> "Q: Who indicated that?
>
> "A: I think [Meyer] Blinder did. And Feuerstein indicated that he had called the S.E.C. and they said it was perfectly all right.
>
> * * * *
>
> "Q: As best you can recall, what did Mr. Feuerstein say regarding this contact with the S.E.C.?
>
> "A: It was more general conversation. But he had called the S.E.C. and it was perfectly all right for Blinder to buy the units.
>
> "Q: Did he say anything else regarding that advice other than what you said, that you can recall?
>
> "A: No.
>
> "Q: Was there any discussion at that time regarding this purchase?
>
> "A: At that time, I don't believe so. The only discussion that involved stickering was when the 90-day period for sending out the prospectus with confirms had to be in. It was the original effective date. That's the only discussion I remember about stickering.
>
> "Q: Was there any discussion at this meeting regarding where the units of the stock from an ac-

counting standpoint would be placed within the firm of Blinder, Robinson?

"A: No.

"Q: Did any other attorney who was present at that meeting render any advice or opinion regarding this subject at that time, or make any comments regarding it?

"A: No one made comments. Bernard Feuerstein was brought in as special counsel.

"Q: Did the discussion of Blinder, Robinson's purchase of American Leisure units come up any other times subsequent to this?

"A: The following day, which was a Thursday, at Metro Bank.

* * * *

"Q: What was said?

"A: Brenman [another attorney] questioned the [propriety] of Blinder buying the units, the one million units.

* * * *

"Q: Was this addressed to some person in particular?

"A: It was—I don't recall. I don't recall. And Feuerstein indicated, as he had the prior night, that he had spoken to the S.E.C., and I don't know whether he mentioned N.A.S.D. or not, but that it was perfectly all right; he had spoken to the S.E.C. on that.

* * * *

"Q: As best you can recall, what did Mr. Brenman say prior to Mr. Feuerstein giving his comments? What did Mr. Brenman say regarding this purchase?

"A: . . . He questioned whether Blinder could buy the securities. And, you know, Feuerstein seemed rather emphatic that it was perfectly all right that he could buy it. You got to recognize Feuerstein was

there as an expert. No one really questioned him. He was the shepherd of the whole case through." [4]

This testimony makes clear the point petitioners have made from the outset: The advice of counsel they received gave them no reason to believe that Blinder, Robinson's purchase of less than ten percent of the offering would prevent the closing of the "all or none" offering. This advice of counsel evidences petitioners' good faith in *allowing the offering to close on that basis, and in assuming in their later actions that the distribution had indeed been completed.* For this reason, the district court erred in finding violations based upon petitioners' awareness that the offering had not, in fact, been completed.

CONCLUSION

For the reasons stated above and in their petition, petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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* *Counsel of Record*

December 14, 1984

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[4] Deposition of Robert P. Shaftan, Esq., at 4-9 (May 28, 1981) (*see* Appendix *infra*, at 4a-8a). Mr. Shaftan's deposition testimony, which was contained in Volume XXV of the Court of Appeals record, is included as an Appendix to this Reply. Present counsel have been unable to determine whether this deposition testimony was introduced into evidence at trial.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-M-1125

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

BLINDER, ROBINSON & CO., INC., *et al.*,
Defendants.

Deposition of ROBERT P. SHAFTAN, taken by Plaintiff and Defendants Blinder, Robinson & Co., Inc. and Meyer Blinder, pursuant to Notice and Subpoena, at the offices of Messrs. Friedman & Shaftan, 4 Park Avenue, New York, New York, on May 28, 1981, at 2:15 p.m.

APPEARANCES:

On behalf of the S.E.C.:

RICHARD S. VERMEIRE, ESQ.,
Trial Counsel
410 Seventeenth Street
Denver, Colorado 80202

On behalf of the Defendants Blinder, Robinson & Co., Inc. and Meyer Blinder:

FISHMAN & GEMAN, ESQS.
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Denver, Colorado 80202

BY: MARC GEMAN, ESQ.

[A] INDEX

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[2]
Whereupon,

ROBERT P. SHAFTAN

having been first duly sworn by the Reporter, was examined and testified as follows:

BY MR. VERMEIRE:

Q Sir, please state your full name and present address for the record.

A Robert P. Shaftan, 7 Prince Edward Road East, Morganville, New Jersey, 07751.

Q Mr. Shaftan, what is your present occupation?

A I'm an attorney.

Q Do you specialize in any particular area of law?

A Primarily a tax lawyer.

Q How long have you been licensed to practice law in the State of New York?

A Since 1964, I believe.

Q You're a partner in the firm of Friedman & Shaftan; is that correct?

MR. GEMAN: Objection.

A Yes.

Q Are you familiar with a company by the name of American Leisure Corp.?

A Yes, I am.

Q How are you familiar with such a company?

[3] A We are presently counsel to the company.

Q When did you become counsel to the company, on or about?

A Well, we were counsel starting in April of '79 until, I guess, October of '79. Then—can this go off the record?

(Discussion held off the record.)

Q It is your recollection that sometime on or about October of '79 that Bernard Feuerstein represented the company in some capacity?

A Yes.

Q To your knowledge, was he considered to be special counsel at that time to the company?

A I think so. I think he was special counsel.

Q At that time did your firm still represent the company as counsel?

A Yes.

Q For the record?

A Yes.

Q Have you continued in that capacity to the present time?

A More or less, yes.

Q Let me ask you this: When was the first time you heard of the possibility that Blinder, Robinson [4] & Co. would purchase stock or units of American Leisure Corp. in the offering?

MR. GEMAN: Objection.

MR. VERMEIRE: Strike the question.

Q Did there come a time that you heard of the possibility of Blinder, Robinson & Co. purchasing American Leisure units in the offering?

A Yes.

Q When was that?

A I don't remember the exact date.

Q Approximately?

A In March of '80.

Q How did you hear that?

A It was in a room in the Brown Palace Hotel in Denver.

Q Who was present?

A Present was Nathan Jacobson, myself, Bernie Feuerstein, Ernie Lampert, Meyer Blinder.

Q Whose room was it?

A It was Nathan Jacobson's room.

Q Why were you in Denver at that time?

A For the closing of the American Leisure offering.

Q Without regard to the date, do you recall [5] what day of the week it was?

A I think it was Wednesday evening. I believe it was a Wednesday evening.

Q As best you can recall, Mr. Shaftan, what was discussed at that meeting at the Brown Palace regarding the possibility of Blinder, Robinson's purchase of stock?

A It was indicated, it was stated that Blinder, Robinson was buying a million shares.

Q Who indicated that?

A I think Blinder did. And Feuerstein indicated that he had called the S.E.C. and they said it was perfectly all right.

Q How did that conversation come up, if you recall?

A I just don't recall. But, you know, it was general discussion, various things about the closing and so on.

Q Was Nate Jacobson present during this discussion?

A Yes, I think so.

Q And Irwin Lampert was also present?

A Yes.

Q Was Greg Scott present during this con- [6] versation?

A I don't believe he was. I know he came in, but I don't think he was present at this conversation. He just came in more or less to say hello, things like that.

Q As best you can recall, what did Mr. Feuerstein say regarding his contact with the S.E.C.?

A It was more general conversation. But he had called the S.E.C. and it was perfectly all right for Blinder to buy the units.

Q Did he say anything else regarding that advice other than what you said, that you can recall?

A No.

Q Was there any discussion at that time regarding any possible stickering prospectus regarding this purchase?

A At that time, I don't believe so. The only discussion that involved stickering was when the 90-day period for sending out the prospectus with confirms had to be in.

It was the original effective date. That's the only discussion I remember about stickering.

Q Was there any discussion at this meeting regarding where the units of the stock from an accounting [7] standpoint would be placed within the firm of Blinder, Robinson?

A No.

Q Did any other attorney who was present at that meeting render any advice or opinion regarding this subject at that time, or make any comments regarding it?

A No one made comments. Bernard Feuerstein was brought in as special counsel.

Q Did the discussion of Blinder, Robinson's purchase of American Leisure units come up any other times subsequent to this?

A The following day, which was a Thursday, at Metro Bank.

Q Who was present at this meeting, Mr. Shaftan?

A Present at the Metro Bank were myself, Irwin Lambert, Bernie Feuerstein, some clerk from the bank who was in charge of escrow, Blinder, Meyer Blinder.

Did I say Irwin Lambert?

Nate Jacobson, Jerry Raskin, and subsequently Brenman and Brenman's son, I think, was there.

Q Whereabouts in the bank—

A It was in a conference room on the second [8] floor.

Q Why were you in the bank at this time?

A We were there for the closing of the transaction.

Q What was said?

A Brenman questioned the priority of Blinder buying the units, the one million units.

Q How did he question it? What did he say, if you can recall?

A He said words to the effect, are you sure he can buy it, it doesn't seem he should be able to.

Q Was this addressed to some person in particular?

A It was—I don't recall. I don't recall.

And Feuerstein indicated, as he did the prior night, that he had spoken to the S.E.C., and I don't know whether he mentioned N.A.S.D. or not, but that it was perfectly all right; he had spoken to the S.E.C. on that.

Q Was there any other discussion at this time regarding that purchase?

A Not that I recall.

Q Did Mr. Brenman respond to this statement of Mr. Feuerstein that he had checked with the S.E.C.?

[9] A I don't recall.

Q Did you express an opinion or comment regarding this purchase in any of the two meetings we've been discussing?

A No.

Q As best you can recall, what did Mr. Brenman say prior to Mr. Feuerstein giving his comments? What did Mr. Brenman say regarding this purchase?

A More the question type. Again, I'm just—from memory. He questioned whether Blinder could buy the securities. And you know, Feuerstein seemed rather emphatic it was perfectly all right that he could buy it. You got to recognize Feuerstein was there as an expert. No one really questioned him. He was the shepherd of the whole case through.

Q You indicated Mr. Brenman questioned it. What do you mean by questioned it?

A He just—you know, more as a question, could you buy it. He wasn't sure in his own mind, apparently.

Q Did he express any doubts whether this could be done?

A Yes, he raised the question and then Feuerstein indicated that, you know, almost offhandedly, [10] that there was absolutely no problem.

Q At this meeting was there any discussion of stickering the prospectus?

A No.

Q Was there any discussion of where the units would be placed within the firm of Blinder, Robinson?

A No.

Q Let me just go back to the meeting the prior day at the Brown Palace. Was it your testimony that Meyer Blinder indicated that the firm was going to buy a number of units or a block of units at that time?

A Well, they were going over the units sold and it was stated that Blinder was buying a million units, I think the number was. And, you know, it was just an offhand-type remark, that this—you know, the impression I got that this already had been discussed and this was a foregone conclusion.

Q Were the mechanics of that purchase discussed either by Meyer Blinder or anyone else at that Brown Palace meeting?

A Not that I recall.

Q Was that purchase discussed, other than the two meetings we've just discussed, was it discussed [11] at any other meeting or any other gathering?

A Not that I was present at, not that I was aware of.

Q How long did you remain in Denver after Thursday?

A I left Thursday about three or four o'clock. And all the documents were held in escrow pending clearance of funds.

Q You mentioned earlier that at the Brown Palace meeting Mr. Feuerstein indicated that he talked with someone from the N.A.S.D. also, is that true?

A I'm not sure. I think he said the S.E.C. and I think he mentioned N.A.S.D., but I couldn't swear to that. But I know the S.E.C. definitely.

Q At the Metro meeting, was Mr. Scott present?

A He was—people were coming in and out. He was present at certain times. The only ones who were really there for the—for the full time were the people I originally mentioned.

Q When you were in Denver during this period of time, were you aware that Irwin Lambert and Nate Jacobson were going to Miami soon after these meetings?

A There was discussion of them possibly [12] going, but nothing definitive.

Q What was that discussion, as best you can recall?

A I don't know if both of them were talking of going. One may have been, the other one might not have been; I don't know. But there was talk of going to Miami.

Q What was said about that?

A They were—there was some fellow there who had a house down there who they were calling. I don't recall his name. And they were speaking to him.

Q For what purpose?

A I don't know.

Q Can you recall the person's name?

A I don't know his name. It—

Q Was it Leon Joseph?

A No, that name wasn't mentioned. It was—

Q Was it Klein?

A Klein, I think so. That name rings a bell.

Q Do you recall when you heard this discussion during the time you were in Denver that week?

A Thursday, it was.

Q Was this at the Metro Bank?

[13] A Yes.

Q Was Meyer Blinder present at that time?

A I don't recall. He might have been. I think he probably was.

Q Did either Mr. Lambert or Mr. Jacobson discuss the purpose of the trip to Miami in your presence?

MR. GEMAN: Objection. It was asked and answered.

A I don't recall. I don't think so. I don't recall.

Q Did anyone discuss the purpose of that meeting in your presence?

A I'm trying to think. It involved purchase of some units, but—

Q American Leisure units?

A American Leisure units. Money to be wired. I don't even know.

Q You mentioned money to be wired. What did you hear about that?

A There was talk of money being wired from various banks, up in Metro.

Q Various banks in Miami?

A I don't know whether it was various [14] banks in Miami, but somehow I connect the two.

Q What did you hear about the money being wired, in particular?

A It was a question of money being wired from banks, and the time difference and how much money was in the escrow account and so on.

Q Who was discussing that?

A The bank was—

Q I'm sorry, the Metro Bank?

A Yes, the clerk from the bank, talking about the money being wired in.

Q Who was he talking to?

A I don't think he was talking—just in general. You know, there was a general conversation going on.

Q Who was present during this conversation?

A Myself, Feuerstein, Lambert, Jacobson, Raskin, Blinder, the clerk from Metro Bank. Again, various people were coming in at various times throughout the day.

MR. VERMEIRE: No further questions.

BY MR. GEMAN:

Q Mr. Shaftan, do you recall when the first discussion about when the 90-day period would be [15] over came up?

A I think it came up the night I was there, Wednesday night.

Q Wednesday night?

A Yes.

Q At the Brown Palace?

A Yes.

Q Who brought it up, do you know?

A It was, again, part of the general discussion. I don't even remember who brought it up. But it was talking about when you had to send out the prospectus with the confirmation and there was discussion—I think Feuerstein took the position that you had to send in from the date of the sticker and Meyer was arguing with him that it should be from the date it became effective.

Q When you say "the date of the sticker," are you referring to the sticker that was put on in February?

A Yes.

Q Concerning Beef & Bison?

A Yes.

Q Was there discussion of another sticker?

A No.

[16] Q Did Irwin Lampert and Nate Jacobson go out to the airport the same time you did on Thursday?

A No.

Q Had they already left?

A No, they were still there. I had left—I was the first one to leave.

Q Did you understand that they also were leaving that day?

A I didn't know when they were leaving.

MR. VERMEIRE: Objection. Did he understand they were leaving?

MR. GEMAN: Yes.

MR. VERMEIRE: I object to the form of the question.

Q Did Mr. Brenman ever mention anything about a new sticker?

A No, not that I recall. He was just there for a very short time. Raskin was primarily in charge of it. Brenman just came by and he was the one who questioned the priority of Blinder buying the units.

Q Did Mr. Raskin mention anything about a new sticker?

A No.

[17] Q Did Mr. Feuerstein mention who he had spoken to at the Commission?

A He may have. I don't recall the name. He may have. I don't recall.

Q Do you recall anything he indicated about that person?

A No, no. Just he had spoken to the S.E.C. and it was all right. I think—he may have mentioned it. I just don't remember.

Q Do you recall whether he mentioned he had known that person prior to—

A No.

Q There was no discussion, no discussion. It was in conversation back and forth. Nothing—more or less that this was an offhand remark. You know, it just stuck with me because . . .

Q Were you back here in your office in New York on Friday?

A No. I went out to Las Vegas Friday. I came to New York and flew out to Las Vegas the following morning, Friday morning.

Q When was the next time you had any discussion with anybody concerning the American Leisure closing?

[18] A When I complained I never got copies of closing documents.

Q When was that?

A Oh, it must have been about a month later.

Q So you never talked with anybody that following week?

A No, I knew that it had closed, but—

Q How did you know that?

A I think I spoke to Irwin Lambert. He said we closed.

MR. GEMAN. I have no further questions.

MR. VERMEIRE: No redirect.

* * * *

(Time indicated: 2:45 p.m.)

ROBERT P. SHAFTAN

Subscribed and sworn to
before me this _____
day of _____, 1981.

_____
Notary Public

[19] CERTIFICATE

I, LORRAINE YERDONEK, a notary public within and for the State of New York, do hereby certify:

That I reported the foregoing deposition in the within entitled matter and that the transcript is a true record of said deposition.

/s/ Lorraine Yerdonek
LORRAINE YERDONEK